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"Not Waving But Drowning": A Look at Waiver and Collective Constitutional Rights in the Criminal Process

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"NOT WAVING BUT DROWNING"*: A LOOK AT WAIVER AND COLLECTIVE CONSTITUTIONAL RIGHTS IN THE CRIMINAL PROCESS

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I. INTRODUCTION

Imagine a community of law-abiding, obedient and compliant citizens. It is a small community. Somehow law enforcement officials have convinced the community of the dangers of urban expansion and the accompanying blight of urban crime, and the entire community has reached a consensus that law enforcement officials must be trusted and given carte blanche to fight the erosion of traditional community values. It has been agreed by each and every resident that the police be allowed to conduct weekly, random searches of residents' homes. This practice of random intrusion has never been the subject of any resident's complaints except for the odd grumbling about the inconvenience of a late night search.

Journalists have recently heard about this community of perfect docility because a group of transient workers who were assigned to complete work on the community dam have left complaining of continuous harassment by officious police officers. A group of investigative journalists have travelled up to the town to report on the event. To their surprise they are greeted by a cheerful contingent of community residents. Deciding to play devil's advocate, one journalist begins a campaign to convince the residents of the errors of their ways. The residents are not at all moved by the claims of the journalist so

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* Taken from Stevie Smith, "Not Waving But Drowning", in R. Ellmann and R. O'Clair, eds., *The Norton Anthology of Modern Poetry* (New York: W.H. Norton & Company, 1988) 654.

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she decides to launch a court action to challenge the practice of random and intrusive consensual searches.

Counsel for the journalist advises her client that the action for a declaration of unconstitutionality would surely generate a lot of publicity but ultimately would be doomed to failure. The journalist cannot believe that a court would condone a practice that violates every constitutional norm designed to constrain state power, but the lawyer does not try to explain to her all the nuances of the law relating to standing, consent searches, reasonable expectation of privacy, and waiver through assumption of risk. Instead he simply says: Why would the court upset a delicate balance that has been agreed upon and is to the satisfaction of all concerned?[1]

Arguably wholesale opting out of the prescriptions of the *Charter of Rights and Freedoms* is permitted by the underlying conception that personal rights are owned and freely renounceable by a rights-bearer. This conception of rights is reflected in doctrines of standing and waiver. In order to challenge the practice of knowing and voluntary waiver of rights it is necessary to challenge the traditional understanding of exercising rights. But before undertaking this challenge, it is important to show that the task is worthwhile because there is an intuitive attraction to the lawyer's assumption that legal intervention is inappropriate if there is not an aggrieved complainant.

Assuming that all members of the idealized community are genuinely satisfied by the current arrangement, one must question the wisdom of an outsider, the journalist, who has no sense of the ethos of the community and who nevertheless presumes to know what is best for all concerned. There is something distastefully paternalistic about the legal claim that citizens cannot agree to forgo claiming their rights in order to attain some desired public welfare. The problem with this intuition is that the residents' claim to autonomy and free choice is only possible in a closed society. As the departure of the transient workers makes clear, a community that decides to transform its values so as to depart from national expectations must in effect close its doors to any visitors and new settlers. A closed society within a purportedly open one is anathema to powerful constitutional values of free association, mobility rights, and pluralism.

Of course the idealized community scenario is overstated. Surely, it is far less controversial if here or there citizens waive various rights in order to secure some perceived personal advantage. What possible harm can arise out of isolated incidents of rights renunciation? This paper will challenge the practice of isolated failure to exercise the full extent of one's legal rights in the

[1] For a case in which a court enjoined widespread unreasonable searches over a 19 day period, see *Lankford* v. *Gelston*, 364 F. 2d 197 (4th Cir. 1966). In this case relief was granted as there was an aggrieved citizen who took the initiative to complain; however, in this hypothetical we are assuming that the agreement of all residents has been obtained.

criminal process. In order to do this it will be necessary to provide a critique of Hohfeldian personal rights.[2] It will be argued that a basic right/duty perspective on constitutional rights is a misguided affirmation of a view of rights that only makes sense, if it does at all, when the paradigm of the legal universe is the law of contract and property. Constitutional rights are not necessarily more sacred and inviolate than ordinary contractarian-type rights; however, they are functionally distinct from rights that originate in the ordering of private law. In essence they are more properly viewed in the perspective of the legal correlatives of immunities and disabilities—a perspective that will ultimately lead to the replacement of personal rights with a notion of collective rights. In this paper, a collective right will be defined as a right that is held in common by all members of a designated class.[3] In describing the content of the right to be tried within a reasonable time, the Supreme Court of Canada recognized the possibility that some Charter rights are collective in nature. In *Mills* v. *R.*,[4] however, the Court held that the right to be tried within a reasonable time is "an individual right and has no collective rights dimension" because "the section is primarily concerned with ensuring respect for the individual".[5] It will be argued that this perspective on constitutional rights in the criminal process is unduly restrictive.

Legal process rights as enumerated in ss.7-14 of the *Charter of Rights and Freedoms* are not designed to benefit designated individuals. They are designed to structure and constrain governmental power, and in their ordering of state/citizen relations they inure to the benefit of all residents. It is improper to view an accused person as the sole owner of a given right because "a system of rights describes the relative position of individuals or groups within a legally defined set of institutional arrangements".[6] This notion of a

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[2] See W.N. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1964). As has been said by W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987) at 24, "all of Hohfeld's conceptions are relations between two distinct parties".

[3] It should be noted that the discussion of collective rights in this paper will focus only upon the legal rights that are for the benefit of society at large, as opposed to rights that attach to distinct groups within society. Collective rights are more commonly discussed with reference to other aspects of the *Charter* dealing with group rights such as language, labour and aboriginal rights. However, these topics will not be pursued here. It is submitted that group rights are properly conceived as being distributed severally and exclusively through all members of the group; however, a collective right that does not attach to a designated group or class, but rather to society at large, presents greater difficulty in distribution. The position advanced in this paper is that a collective, societal right is not based upon the concrete interests of its remarkably diverse members, and accordingly these rights are not personally possessed but rather held in common. For some discussion of the notion of collective right, see, S. Lynd, "Communal Rights" (1984) 62 Tex. L. Rev. 1417; D. Dorenberg, "'We the People': John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action" (1985) 73 Calif. L.Rev. 52.

[4] (1986), 26 C.C.C. (3d) 481 [hereinafter *Mills*].

[5] *Ibid.* at 537.

[6] R. Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L.Rev. 561 at 599.

rule or right being designed for society at large is not an alien concept in our legal culture. Rules establishing the jurisdiction of criminal courts cannot be waived even if the waiver would be to the satisfaction of all concerned. The Supreme Court of Canada has not hesitated to declare that "jurisdiction cannot be conferred by consent".[7] If accused individuals cannot waive jurisdictional requirements, even those that are picayune and inconvenient in their application, one must wonder why it is that one can waive constitutional requirements that presumably protect fundamental interests in freedom and equality.[8]

In this examination of the phenomena of waiving, renouncing, relinquishing, forfeiting, and alienating rights, it will be argued that the movement towards recognizing rights as collective in nature will result in a reorientation of legal process rights as immunity rights. All residents have designated spheres of freedom from state interference, and this immunity is protected by the jural correlative of a state disability.[9] The Supreme Court of Canada recognized this view of rights when it declared that the *Charter of Rights* is "intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action".[10] However, this resounding declaration has had little practical impact because the Court has continued to perceive legal process rights as claim-rights that are subject to a rights-bearer's power to waive the exercise of the right. Each and every time the rights-bearer waives a right she converts the state's disability into an authorized action.

The reorientation of rights has dramatic implications for the subterranean practice of waiver. The practice is subterranean because the waiver of rights effectively shields that state/citizen encounter from the rigours of challenge in open court. Although furtive in nature, the practice is neither isolated nor exceptional. In fact, waiver exercises a force that is both pervasive and self-perpetuating. This claim about the presence of waiver is not self-evident, so before turning to the theoretical reorientation of rights, it is necessary to demonstrate the silent entrenchment of a practice of waiving, relinquishing,

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[7] *Phillips and Phillips* v. *The Queen* (1983), 8 C.C.C. (3d) 118 at 121. See also *R.* v. *Thompson* (1987), 3 W.C.B. (2d) 76 (N.S. C.A.).

[8] It should be noted that the S.C.C. in *Mills*, *supra*, note 4, seemed to indicate that constitutional rights do not necessarily relate to the jurisdiction of the court; thus this may serve to distinguish the inflexibility of jurisdictional requirements from the waivability of constitutional rights. However, the Court in the subsequent case of *R.* v. *Rahey* (1987), 33 C.C.C. (3d) at 289 [hereinafter *Rahey*], retreated somewhat from this position, and in any event it will be argued that the Court is wrong in concluding that a right's violation does not go to the heart of the court's jurisdiction.

[9] These categories are borrowed from the Hohfeldian scheme, see *supra*, note 1. For a brief description of Hohfeld's scheme and a definition of immunity/disability, see W.J. Kamba, "Legal Theory and Hohfeld's Analysis of a Legal Right" (1974) Jurid. Rev. 249.

[10] *Hunter, Director of Investigation & Research, Combines Investigation Branch* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 156 [hereinafter *Hunter*].

renouncing, or forfeiting of similarly entrenched rights. Only then will it be possible to make a convincing case that waiving is metaphorically similar to drowning.

II. THE SIGNIFICANCE AND PREVALENCE OF WAIVER

Adversarial justice contemplates a stylized battle between an individual and a state representative. Accordingly, one of the purposes served by a system of rights is to correct the balance of advantages to ensure that the adversaries are similarly empowered.[11] A fair fight requires that the parties are not grossly mismatched in terms of power and resources. If a right serves to balance advantage then it is likely that one of the beneficiaries of the right may choose to forgo exercising this right because of a belief that the advantage is marginal or may even be a disadvantage in the circumstances. Adversarial justice encourages and is consistent with the classical liberal perspective on rights which sees a right as a vehicle for enhancing individual autonomy. The essence of autonomy is choice, and the individual is permitted either to insist upon or waive a right in accordance with that individual's perception of her self-interest.

Legal systems that employ forms of adversarial justice contain rights of a "yielding nature"[12] that bend with the wishes of the rights-bearer. Professor Mirjan Damaska explains:

> [T]he ideology of reactive government favors the conversion of law into rights personal to citizens. And because citizens are sovereign in determining their own interests, including their chances of success in litigation, they are in principle free to renounce rights accorded them in the legal process. Rights can thus be used as bargaining chips in negotiations between procedural parties. In the end, the state's regulation of the legal process is not much more than a baseline from which litigants can depart when and if they so choose. Breach of a procedural regulation is in itself not sufficient to provoke remedial action by the state. Only when a litigant objects to the breach must the adjudicator intervene to settle the collateral conflict; therefore, absence of an objection can be interpreted as tacit consent to departure from the norm.[13]

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[11] The allocation of rights and safeguards has sometimes been described as a rights offset theory "where the defendant is given a set of rights to offset the natural resource and public support advantages of period the prosecutor". See G. Goodpaster, "On the Theory of American Adversary Criminal Trial" (1987) J. Crim. L. & Criminology 118 at 126. See also A. Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure" (1960) 69 Yale L.J. 1149.

[12] M. Damaska, *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986) at 98.

[13] *Ibid.* at 99.

The pervasiveness of this ideology is not noticed because it has effectively become an accepted aspect of our legal culture. Only when our system is compared with the legal culture of non-adversarial jurisdictions do we become wholly aware of the structuring of our process on the basis of individual choice. Even the non-contentious Canadian practice of allowing defendants to choose the mode of trial (i.e. trial by provincial court judge or judge alone or judge and jury) may "seem fantastic to a lawyer from a Continental or communist country".[14] In order to comprehend the vast infiltration of personal choice through waiver and related doctrines it is necessary to outline briefly its operation at the various stages of the criminal process. Where it is applicable reference will be made to the practice of other jurisdictions to illustrate that individual dominion over procedural forms is neither natural nor inevitable.

A. STANDING

Without exception, all constitutional rights need an adjudicatory forum for their enforcement. Access to the courts is a prerequisite to the effective enforcement of rights. Adversarial systems of justice do not allow for unrestricted access to courts because they contemplate a stylized battle between parties that have a direct personal interest in the outcome of the case. Standing rules operate to insure that claims of unconstitutionality are only brought by individuals who have been injured by state action. The Supreme Court of Canada has recently summarized the reasons for restricting access to the courts to challenge constitutionally infirm state action:

> The traditional judicial concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the court should have the benefit of the contending parties points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to other branches of government.[15]

These three reasons for restricting access to the courts are suspect. First, the concern about scarce resources is a realistic concern but expediency should never stand in the way of vindication of fundamental rights. Second, the concern about having a full airing of the complaint by those most intimately involved is based upon the questionable epistemological premises of adversary

[14] *Ibid.*

[15] *The Minister of Finance of Canada* v. *Finlay*, [1986] 2 S.C.R. 607 at 631 [hereinafter *Finlay*].

justice.[16] There is great doubt about the superiority of party presentation, and, in any event, if a nonparty was to bring a constitutional claim the solution is not to deny standing but to invite the interested parties to join. Finally, the concern about the proper institutional relationship between the judiciary and the legislature elevates the separation of powers doctrine far beyond its original design.[17]

There may be more concern in the United States with the institutional relationship between court and legislature because the constitution specifically requires that the judiciary restrict its interventions to a "case or controversy".[18] Accordingly, the U.S. Supreme Court would not allow an action brought by minority residents of Philadelphia to challenge alleged police misconduct.[19] In the lower court it was established that police misconduct was not "rare or isolated"[20] and the court ordered that the police draft a comprehensive program for handling citizen complaints. However, the Supreme Court reversed, holding that the petitioners lacked the requisite personal stake in the outcome to establish standing because at its highest the petitioners could only complain about the possibility of future violations of their rights by a small minority of state officials.

More recently, the U.S. Supreme Court showed how restrictive standing rules can operate to immunize well-established and systemic constitutional violations.[21] Adolph Lyons, a 24 year old black man living in Los Angeles, was stopped by police on a routine car check. The police administered a chokehold to Lyons that rendered him unconscious. Apparently, departmental policy authorized the use of the chokehold even when no violence was threatened against the officer and even if the officer is not trained in the technique. Between 1975-1983 no less than 16 people died following the use of the chokehold. Although Lyons had been personally assaulted by the police, the court would not allow him to bring an action for an injunction barring the use of chokeholds except in situations of reasonable self-defence. In order for

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[16] For an examination of the presumed epistemological benefits of party presentation under adversarial justice, see M. Damaska, "Presentation and Factfinding Precision" (1975) 123 U. of Pa. L. Rev. 1083; Thibaut, "A Theory of Procedure" (1978) 66 Calif. L.Rev. 541. Leff says that "it is inherently implausible that an epistemological inquiry in the form of an agonistic game maximizes throughness and accuracy of factual determination" in A. Leff, "Law And" (1978) 87 Yale L.J. 989.

[17] Stanley A. De Smith writes that "no writer of repute would claim that it [the separation of powers doctrine] is a central feature of the modern British Constitution". S. A. De Smith, *Constitutional and Administrative Law*, 3d. ed. (New York: Penguin Books, 1977) at 36. Remember that the preamble of our *Constitution Act*, 1867, states that we are possessed of a "constitution similar in principle to that of the United Kingdom".

[18] See Article III of the United States Constitution.

[19] *Rizzo* v. *Goode*, 423 U.S. 362 (1975).

[20] *Ibid.* at 383.

[21] *City of Los Angeles* v. *Lyons*, 103 S. Ct. 1660 (1983).

Lyons to be afforded standing the court demanded absurd and unattainable requirements:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner.[22]

Presumably, the absence of a case or controversy requirement in the *Charter* should mean that the standing requirements in Canada are more relaxed. Traditionally, the opportunity for standing to challenge state action has been limited to those who can show interference with a private right, or where a public right is violated, to those plaintiffs who can show special damage peculiar to themselves.[23] These requirements are relaxed to recognize a "public interest standing" to bring an action for a declaration to challenge the constitutionality of legislation. In this case, the court has discretion to permit standing if the plaintiff has a genuine interest in the legislation and there is no other reasonable and effective manner of bringing the issue before the court.[24] In addition, unlike the American approach, standing will not be denied solely on the basis that the complaint concerns an allegation of anticipated, future violations of the Constitution.[25]

The current doctrinal approach to standing in Canada promises more than it can deliver. First, the discretionary grant of standing is limited to challenges to legislation, whereas the majority of complaints about constitutional violations concern official conduct that occurs independently of legislative authorization. Second, the requirement that there be no other reasonable manner of raising the issue precludes actions being brought where there is a waiver of rights. Presumably, the court would hold that the most reasonable manner of raising the issue would be to have the party waiving the right bring the action.[26]

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[22] *Ibid.* at 1667.

[23] These requirements are taken from *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109 and approved by the S.C.C. in *Finlay*, *supra*, note 15.

[24] See *Finlay*, *supra*, note 15; *Minister of Justice of Canada* v. *Borowski*, [1981] 2 S.C.R. 575.

[25] *Operation Dismantle* v. *R.*, [1985] 1 S.C.R. 441 at 486; The granting of relief for prospective violations is confirmed in *R.* v. *Vermette*, [1988] 1 S.C.R. 985.

[26] This is reflected in the implicit requirement that, to challenge legislation, the citizen must first inquire whether the Attorney General is willing to bring the action. See *Finlay*, *supra*, note 15 at 627-28. Presumably, a party waiving a right is the most appropriate litigant, and the court may preclude another from bringing an action unless the waiving party can be convinced to change her mind.

In fact, the Canadian courts have followed the restrictive American approach in granting or denying standing to challenge official conduct that is independent of legislative authorization. In *Rawlings* v. *Kentucky*,[27] the U.S. Supreme Court would not allow standing to challenge an unconstitutional search of a purse of a friend of the accused. The accused admitted ownership of the contraband found in the purse, but was denied standing because (i) he had not known the friend for a long time; (ii) he had not previously had access to the purse; (iii) he had no right to exclude others from the purse; and (iv) he took no precautions to protect any privacy interest he might have in the purse. Implicit in this ruling is the view that rights are held personally, and before an individual may complain she must show a direct interference with her interest in property or privacy. The austerity of this individual rights approach is reflected in other cases where the court would not allow an accused to challenge official conduct when the police steal items which are held by a third party and which can be used to incriminate the accused.[28]

Canadian courts have followed suit. Some lower courts have been inclined to relax the requirements for standing.[29] The consensus among the higher courts, however, has been to conclude that the protection against unreasonable search and seizure is a personal right that can only be claimed by one who has a proprietary interest in the premises being searched.[30] In essence, one cannot complain if items one has entrusted to another have been unlawfully seized. One commentator has condemned the current approach to standing because:

> It assumes that expectations of privacy stem only from narrowly conceived property rights or other specifically articulated relatonships. Its background assumption is one of radical individualism rather than one of shared access, trust and concern. It assumes, absent explicit proof to the contrary, that people do not share.[31]

While pursuing the formalism of standing requirements the courts appear unconcerned that the appearance of justice is sorely lacking. The height of judicial insensitivity to the appearance of justice appeared in a case in which the court allowed the police to rely upon information brutally extracted

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[27] 448 U.S. 98 (1980).

[28] In *Payner* v. *U.S.*, 447 U.S. 727 the police surreptitiously seized a banker's briefcase, photographed the contents, then used the documents to incriminate the accused.

[29] See, e.g., *R.* v. *Leonard* (1987), 27 C.R.R. 128 (Ont. Dist. Ct.); *R.* v. *Guiller* (1987), 25 C.R.R. 273 (Ont. Dist. Ct.).

[30] *Re Church of Scientology and the Queen* (1985), 12 C.R.R. 257 (Ont. H.C.); *R.* v. *Leaney* (1987), 38 C.C.C. (3d) 263 (Alta. C.A.); *R.* v. *Cloutare and Tabah* (1986), 31 C.C.C. (3d) 271 (Que. C.A.); *Model Power* v. *R.* (1981), 21 C.R. (3d) 195 (Ont. C.A.).

[31] M. Coombs, "Shared Privacy and the Fourth Amendment, or the Rights of Relationships" (1988) 75 Calif. L.Rev. 1592 at 1631.

during a violent interrogation.[32] The violence was not employed against the accused and he had no right to complain about the mistreatment of others.

Adversarial justice is obsessed with limiting judicial intervention to the personal claims of those people who are ordered to appear in court. Members of the public are not allowed to intervene in or commence a prosecution against the wishes of the state,[33] and an accused person is similarly denied the opportunity to advance the claims of others in her defence. There is a certain logical symmetry in denying public participation on the side of both the prosecutor and the defence, but one must question the wisdom of silencing the community voice in the administration of justice in an area of law that purports to serve the public interest.

B. INVESTIGATION

When one thinks of a criminal investigation, the common perception is that of the detective probing, inquiring, and conducting forensic tests in an attempt to make all the pieces fit the puzzle. In fact a large part of an investigation revolves around securing the consent of citizens to provide information and material. Law enforcement would suffer immensely if citizens withdrew their cooperation. In any investigation, however, the cooperative citizen may become an accused and then the cooperation exhibited by the citizen becomes a waiver or forfeiture of the rights attendant upon being an accused.

The *Charter of Rights* protects us from unreasonable searches and seizures. This right is designed to provide us with a reasonable expectation of privacy, but this right is by no means absolute. It may be overridden by a superior state interest. The balancing formula is simple: "the state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at a point where credibly-based probability replaces suspicion".[34] To ensure that state officials interfere only when a credibly-based probability of crime has been reached we have interposed the requirement of a warrant. A search is presumptively unreasonable if it has not been previously authorized by a neutral arbiter.[35]

This relatively simple approach is abandoned in its entirety if a citizen consents to being searched. In fact, one of the most prevalent modes of

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[32] *People* v. *Portelli*, 205 N.E. (2d) 857 (1965).

[33] See, e.g., *Re Hamilton* v. *The Queen* (1986), 30 C.C.C. (3d) 65 (B.C. S.C.); *Campbell* v. *A.G. of Ontario* (1987), 31 C.C.C. (3d) 289 (Ont. H.C.); *Re Baker and the Queen* (1986), 26 C.C.C. (3d) 123 (B.C. S.C.).

[34] See *Hunter*, *supra*, note 10.

[35] Following the lead of *Hunter*, *supra*, note 10, other cases have established this modified warrant *per se* model. See *R.* v. *Debot* (1981), 30 C.C.C. (3d) 207 (Ont. C.A.); *R.* v. *Collins* (1987), 56 C.R. (3d) (S.C.C.).

conducting searches is upon consent,[36] and once consent is obtained the safeguards of the Constitution are inapplicable because the transaction is apparently transformed into a private affair.[37] Despite the prevalence of consent searches few jurists question the legitimacy of consenting to unreasonable searches. In the early days of the *Charter* some lower courts criticized the juridical significance of consent:

> A search is either unreasonable under s. 8 of the Charter or it is not and the fact that an accused consented to it is irrelevant. In my opinion, an accused cannot "consent" to an infringement of his rights under the Charter.[38]

The view that one cannot consent to a constitutional violation was short-lived, and courts now readily accept the validity of a consent search.[39]

The United States Supreme Court gave some indication as to why this practice is permitted.[40] They suggested that the practice was justified because (i) the consent search may not be more invasive than a search by warrant; (ii) the Constitution should not discourage citizens from aiding in the investigation of crime; (iii) the police need a mechanism for investigating a suspicion of illicit activity that has not crystallized into probable cause; and (iv) the citizen will benefit from the consent because a fruitless consent search will allow the citizen to avoid arrest or further detention. In addition to these pragmatic considerations the court was also of the view that "[c]onsent searches are permitted, not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights."[41]

When the consent search is seen as another manifestation of waiver the court has little difficulty justifying it because "the law of waiver is...largely unconcerned with the substantive question of what can be waived and what not; rather the tenor of the law is to elaborate second-order procedures for valid renunciation of rights".[42] Once defined as waiver the second-order

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[36] See, Law Reform Commission of Canada, *Police Powers - Search and Seizure in Criminal Law Enforcement* (Ottawa: The Commission, 1983) at 81-83 and 89-90.

[37] *Ibid.* at 52.

[38] *R.* v. *Heisler* (1983), 7 C.R.R. 1 at 9 (Alta. Prov. Ct.).

[39] Most of the reported cases have found that the consent was obtained invalidly; however, the courts never question the validity of attempting to secure consent, see, e.g., *R.* v. *Woodward* (1984), 6 C.R.R. 130 (Ont. Co. Ct); *R.* v. *Pulfer* (1984), 37 Sask. R. 254 (Sask. Prov. Ct); *R.* v. *Kenyon* (1986), 53 C.R. (3d) 249 (Ont. Dist. Ct.); *R.* v. *Squires* (1987), 22 C.R.R. 260 (Ont. Prov. Ct.); *R.* v. *Meyers* (1987), 58 C.R. (3d) 176 (Alta. Q.B.) [hereinafter *Meyers*]; *R.* v. *Kaplinowski* (1987), 26 C.R.R. 154 (B.C. C.A.).

[40] *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) [hereinafter *Schneckloth*].

[41] *Ibid.* at 283.

[42] Damaska, *supra*, note 12 at 99.

procedures fall neatly into place. A waiver is commonly defined as "an intentional relinquishment or abandonment of a known right or privilege",[43] and, accordingly, a valid waiver requires a conscious choice that is both informed and voluntary. However, courts have been reluctant to apply the logic of waiver in requiring that the consenting party be aware of her right to refuse.

In 1973 the U.S. Supreme Court rejected the claim that the consenting party must be informed of her right to refuse entry and the search.[44] The court held that knowledge of one's right is only one factor to take into account in determining whether the citizen voluntarily consented. The court assumed that requiring the police to notify the citizen of her rights was an impracticality, because consent searches are informal interactions that "are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights".[45] In effect the court held that the standard of a knowing and intelligent waiver only applies to rights needed to preserve a fair trial, and that the relinquishment of the non-trial right of privacy may be made in ignorance. As long as the consent is voluntary in the sense of being free from coercion, the constitutional safeguards are happily abandoned.

The Canadian situation roughly parallels the American doctrine. In a non-constitutional context the Supreme Court of Canada noted that it is misleading to believe that any citizen/police interaction could be characterized as voluntary if the citizen is not informed of her options.[46] Despite this insightful comment most Canadian courts readily find valid consent even when the consenter is not fully informed.[47] The relevant standard is that the consent be free from coercion, and even when a court indicates that it will require that the consenter be fully informed, the standard will be met by a veiled threat from an officer that if the right of refusal is exercised then a warrant will be obtained.[48] It is not surprising that police officers rely so

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[43] *Johnson* v. *Zerbst*, 304 U.S. 458 at 464 (1938).

[44] *Schneckloth*, *supra*, note 40.

[45] *Ibid.* at 232.

[46] In *R.* v. *Dedman* (1985), 46 C.R. (3d) 193, the court would not consider that compliance with a R.I.D.E. spotcheck was a voluntary stop. Ledain J. stated (at 215) "a person should not be prevented from invoking a lack of statutory or common law authority for a police demand or direction by reason of compliance with it in the absence of a clear indication from the police officer that the person is free to refuse to comply. Because of the intimidating nature of police action and uncertainty as to the extent of police powers, compliance in such circumstances cannot be regarded as voluntary in any meaningful sense."

[47] The majority of cases cited at note 39 found consent to be invalid not for reasons of lack of information about the individual's options, but because of intimidation and coercion. Only one of the cases cited, *Meyers*, even mentioned knowledge of a right to refuse as being relevant.

[48] See *Meyers*, *supra*, note 39.

heavily on consent searches given that the courts have eliminated the knowing and intelligent portion of the standard employed for most other waivers.

In addition, the modern technological counterpart of the physical search, electronic surveillance, employs consent as an integral part of its empowering scheme.[49] A wiretap can be obtained upon authorization, but absent judicial authorization, any evidence obtained by an unauthorized tap will still be admitted into evidence if one of the participants to the conversation consents to either the interception or the admission of the evidence. For both the physical and electronic search, the law contemplates the unauthorized obtaining of evidence by virtue of third party consent.[50]

In 1979 the Supreme Court of Canada approved of intercepting communications based upon the presence of third party consent; however, they expressed some sympathy for the problem of the "unilateral destruction of any such right by one party to a protected conversation".[51] Despite the expression of sympathy the court felt bound by the clear intention of Parliament. Parliament had ordained that the autonomy interest of a non-party is of greater importance than the autonomy interest of the accused.

When the *Charter* lifted the constraining force of Parliamentary supremacy, this did not convert the court's sympathies into action. Constitutional challenges to the practice of consent wiretaps have been unsuccessful.[52] The comparative perspective illustrates that consent wiretaps may be more difficult to justify than consent searches. European countries have frowned upon heavy reliance on electronic surveillance, and German courts have declared consent wiretaps to be unconstitutional.[53] The German constitution guarantees the right to develop one's personality, and the courts have concluded that allowing one participant to a private communication to unilaterally decide to reveal the contents of the conversation would unduly stunt the growth of the personality of the nonconsenting participant.[54]

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[49] *Criminal Code*, R.S.C. 1970, Chap. C-34, ss. 178.11, 178.16.

[50] The previous discussion of consent searches focused only upon consent given by the targeted individual. Third-party consent to search has not yet become a major issue in Canadian caselaw, but it is a significant feature of American Fourth Amendment doctrine, see discussion in M. Gardiner, "Consent as a Bar to Fourth Amendment Scope - A Critique of a Common Theory" (1980) 71 J. Crim. L. and Criminology 443; Coombs, *supra*, note 31 at 1642-1650; P. Goldberger, "Consent, Expectations of Privacy, and the Meaning of Searches in the Fourth Amendment" (1984) 75 J. Crim. L. & Criminology 319.

[51] *Rosen* v. *R.*, [1980] 1 S.C.R. 961 at 975.

[52] *R.* v. *Sanelli* (1987), 60 C.R. (3d) 142 (Ont. C.A.) [hereinafter *Sanelli*]; *R.* v. *Wiggins*, (1988), 42 C.C.C.(3d) 303 (B.C.C.A.); for a contrary decision see *R.* v. *Bilodeau* (1987), 3 W.C.B. (2d) 104 (B.C. Dist. Ct.).

[53] See discussion in Pakter, "Exclusionary Rules in France, Germany and Italy" (1985), 9 Hastings Int'l & Comp. L. Rev. 2, 37-50; Carr, "Wiretapping in West Germany" (1981) 29 Am. J. Comp. L. 607.

[54] Carr, *supra*, note 53 at 640.

Canadian and American courts have not adopted a similar view. In Germany the court does not dwell upon the legality of the police officer's conduct—the exclusionary rule does not operate to deter official misconduct. It can only be employed if official conduct or misconduct unduly burdens an individual's constitutional rights. This mild balancing does not lead to much exclusion, but it does provide greater protection to aspects of social life that are considered to be integral to the free development of the personality of the individual. On the other hand, Canadian and American courts are more concerned with police illegality. An exercise of official power is not illegal if it is authorized, and consent interceptions have been duly authorized by legislation.

All countries have relied upon use of police informants and spies, but North American law enforcement has grown to be heavily dependent upon bargaining with co-accused individuals. Many successful undercover operations revolve around betrayal by co-conspirators. Unilateral consents have become commonplace in our law enforcement because prosecutorial discretion allows the state to secure or induce consent with the carrot of immunity or a related benefit that is part of a plea bargain. The European experience shows a distaste for extensive prosecutorial discretion, so plea bargaining and official grants of immunity are not commonplace.[55] The system is premised upon compulsory prosecution,[56] and an incidental by-product is the absence of betrayed loyalties from acquaintances, friends, and business partners who have been tempted by an excellent deal offered by the state.

To facilitate investigation by betrayal, American and Canadian courts have construed the constitutional right to privacy in a manner in which it may be easily forfeited. To establish a claim that an investigatory practice violates our right to be secure against unreasonable searches and seizures the claimant must meet a twofold requirement: "first, that a person had exhibited an actual (subjective) expectation of privacy; and second, that the expectation was one that society was prepared to recognize as reasonable".[57] A consideration of the cases reveals that the subjective component operates as a forfeiture of rights—if the claimant has conducted herself in a manner that is inconsistent with the

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[55] See Damaska, "The Reality of Prosecutorial Discretion: Comments on a German Monograph" (1981) 29 Am. J. Comp. L. 119, 129; Volkman-Schluck, "Continental European Criminal Procedures: True or Illusive Model" (1981) Am. J. Comp. L. 1.

[56] There is a debate as to the extent to which the principle of legality and compulsory prosecution is truly a part of European practice. For an introduction to the debate, see Goldstein and Marcus, "The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy and Germany" (1977) 87 Yale L.J. 240; Langbein and Weinrib, "Continental Criminal Procedure: 'Myth' and Reality" (1978) 87 Yale L.J. 1549; Langbein, "Controlling Prosecutorial Discretion in Germany" (1974) 41 U. Chi. L.Rev. 439.

[57] *R.* v. *Wong* (1987), 56 C.R. (3d) 352 at 362 (Ont. C.A.).

assertion of a right to privacy then she becomes disentitled from subsequently asserting the right in a trial context.[58]

This implicit forfeiture of rights is the foundation for the conclusion that consent wiretaps are constitutional. Both the American and Canadian courts reasoned that when one converses with another there is an assumption of risk that one of the participants may reveal the content of the conversation.[59] The courts define a conversation as a "voluntarily shared exchange which contains an assumed risk of its repetition".[60] In other words, one can only safeguard privacy by refusing to converse, so that breaking the cone of silence is construed as conduct inconsistent with a desire to assert one's right. There is no fear that this doctrine of assumption of risk may chill the exercise of free speech (or the development of the personality) because "it is only those whose conversations are concerned with various illegal activities who will be seriously concerned about the possibility of their remarks being recorded".[61]

This last comment confirms that the reasonable expectation of privacy test operates as a form of forfeiture by misconduct. By focusing on the illegal nature of the transaction the court is saying in effect that the misconduct disentitles the rights-bearer from claiming the right. Although some judges have recognized that the relevant inquiry should not be "on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society",[62] the courts have continually focused upon the subjective component of the privacy test to arrive at the conclusion that one engaged in criminal activity has become disentitled from claiming one's rights. It is this judicial approach that explains the surprising conclusions that one does not have any privacy interest when one walks on the street or when one uses a public washroom.[63]

In this area of the law, the courts have construed the constitutional safeguards so that they do not automatically protect the intended beneficiary, but rather as requiring the prior condition that there be an active assertion of the right. In discussing the constitutionality of aerial surveillance of an

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[58] For example, see *ibid.*; *R.* v. *Lofthouse* (1988), 62 C.R. (3d) 157 (Ont . C.A.); *R.* v. *Boivin* (1986), 28 C.C.C. (3d) 129 (Que. C.A.). In all these cases the courts held that a reasonable expectation of privacy did not exist because the defendants were engaged in criminal activities with others. The fact that they acted in a secretive manner did not manifest an assertion of their privacy interest but merely a desire not to be detected. One of the only recent cases in which the court did not adopt an *ad hominem* approach to strip an individual of her privacy right is *R.* v. *Asencious* (1987), 34 C.C.C. (3d) 168 (Que. C.A.).

[59] *U.S.* v. *White*, 401 U.S. 745 (1971); *Sanelli*, *supra*, note 52.

[60] *Sanelli*, *supra*, note 52 at 152.

[61] *Ibid.* at 151.

[62] *Smith* v. *Maryland*, 99 S. Ct. 2577 at 2585 (1979).

[63] Re street, see *U.S.* v. *Knotts*, 103 S. Ct. 1081 (1983). Re washroom, see *R.* v. *Lofthouse*, *supra*, note 58.

accused's backyard, the U.S. Supreme Court noted that the accused took "normal precautions to maintain his privacy" by building a ten foot fence, but this assertion of the right only applied against "normal sidewalk traffic" and the accused was not "entitled to assume" that "his unlawful conduct will not be observed by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard".[64] This focus upon the activities and conduct of the rights-claimant stultifies the application of the right. The focus on the personal nature of the right has rendered s. 8 of the *Charter* and the Fourth Amendment powerless:

> Anyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the [fourth] amendment, because, if it were, the amendment's benefit would be too stingy to preserve the kind of open society to which we are committed and in which the amendment is supposed to function.[65]

C. INTERROGATION

If the state is interested not only in seizing personal possessions but is also interested in the content of one's mind, then the state encounters a difficulty. The seizure of personal possessions is permitted if the state has a superior interest in detecting crime that is evidenced by probable cause and supported by a warrant. To probe an individual's thoughts, it is not sufficient for the state merely to assert a superior state interest:[66] no one can be compelled to speak. However, although the right to remain silent is absolute, it is not inalienable. The state may be permitted to probe a speaker's innermost thoughts, but only if the speaker consents.

The framework for interrogating suspects and accused individuals is clear and simple. First, the state cannot compel attendance for interrogation unless it has probable cause to arrest.[67] Absent probable cause, the state can detain an individual for questioning only if it requests her presence and she agrees.[68] Once she agrees to a request there are no attendant rights save for her absolute right to remain mute.[69] However, if the state arrests her on probable cause of

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[64] *California* v. *Ciraolo*, 106 S. Ct. 1809 at 1813 (1986).

[65] Amsterdam, "Perspectives on the Fourth Amendment" (1974) 58 Minn. L.Rev. 349 at 402.

[66] For an analysis of the distinction between searching personal possessions and probing the contents of the mind, see Uviller, "Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint" (1987) Colum. L.Rev. 1137, 1145-7.

[67] *R.* v. *Duguay* (1985), 45 C.R. (3d) 140 (Ont. C.A.); *Dunaway* v. *New York*, 442 U.S. 200 (1979).

[68] *R.* v. *Bazinet* (1986), 25 C.C.C. (3d) 273 (Ont. C.A.); *R.* v. *Smith* (1986), 25 C.C.C. (3d) 361 (Ont. C.A.).

[69] This is because a voluntary accompaniment to the police station does not constitute detention under the *Charter*, and thus no attendant rights are triggered, see cases cited, *supra*, note 68.

having committed a crime, or if the state demands her presence such that she reasonably believes she is being detained, then Charter safeguards are triggered.[70] Included in the safeguards is the right to retain and instruct counsel and to be informed of that right (section 10(b) of the *Charter*).

The right to counsel is not what it appears to be. American and Canadian courts have not interpreted the right so as to preclude interrogation in the absence of counsel. What is contemplated by the right is that an individual be permitted to speak with counsel before answering questions because station-house questioning is inherently coercive, and a court cannot be certain that one has voluntarily agreed to speak unless one has been given the opportunity to speak with counsel.[71] There is never any suggestion that it is improper for an individual to waive one's right to remain silent, one's right against self-incrimination; rather, the right to be informed of the right to counsel is an instrumental right that is designed to facilitate the waiver.[72] If the police have informed a person that she may contact counsel, then a court can rest assured that any conversations she has with the police subsequent to the warning are a product of a voluntary choice to speak.

A consistent doctrinal approach to the right to counsel has emerged from the Canadian case law. First, it is incumbent upon the police to inform an accused, in language she understands, of her right to contact a lawyer shortly after she has been arrested or detained. Second, if she asserts her right to contact a lawyer then the police are disabled from questioning until a reasonable opportunity to contact counsel has been permitted.[73] However, if she fails to assert the right by requesting counsel then the interaction will be evaluated in one of two ways. If there are no exceptional circumstances, such as shock, drunkenness, or a mental handicap, which would suggest that she is unable to understand the warning, then any conversation she has with the police subsequent to the warning will be construed as a waiver of her right to counsel and her right to remain silent.[74] If there are exceptional circumstances, then her decision to speak will not automatically be construed as a waiver.[75] The presence of special circumstances poses problems for deter-

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[70] The reasonable apprehension of detention test emerges from *R.* v. *Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.); *R.* v. *Moran* (1987), 21 O.A.C. 257 (Ont. C.A.).

[71] The seminal case of *Miranda* v. *State of Arizona*, 383 U.S. 1602 (1966) [hereinafter *Miranda*] is premised upon the inherent coerciveness of station-house interrogation. The famous Miranda warnings are a judicial attempt to offset this coercive environment.

[72] In *Miranda*, *ibid.* at 470, the court notes that "no effective waiver of the right to counsel during interrogation can be made unless specifically made after the warnings have been given". That is, if the warning of the instrumental right has been given then the court will presume subsequent waivers to be effective and voluntary.

[73] These two points emerge clearly from *R.* v. *Manninen* (1987), 34 C.C.C. (3d) 385 (S.C.C.); *R.* v. *Williams* (1986), 31 C.C.C. (3d) 48 (Alta. C.A.); *R.* v. *Anderson* (1984), 10 C.C.C. (3d) 417 (Ont. C.A.).

[74] *R.* v. *Baig* (1987), 37 C.C.C. (3d) 181 (S.C.C.).

[75] *R.* v. *Clarkson* (1986), 50 C.R. (3d) 289 (S.C.C.) [hereinafter *Clarkson*].

mining if an individual has waived her rights because the Supreme Court of Canada has adopted a higher standard for waiver than the voluntary, free from coercion, standard employed in the consent search scenario. The Court has held that "an accused must knowingly, intelligently and with a full understanding of the implications, waive his constitutional right to counsel".[76] The Court established an "awareness of consequences" test that requires the police to ensure that the incapacitated individual is fully aware of the consequences of waiving her right. It is not altogether clear what type of information the police must provide beyond the elliptical and clear warning that an individual has a right to retain and instruct counsel, but it appears that the police may have to elaborate upon the right to remain silent and the fact that a decision to speak means that an accused's words can be used against her in a court of law.

The defining feature of the right to counsel is not a requirement that counsel be present, but rather is an examination of the circumstances of the encounter to determine if the individual in not asserting the right has knowingly waived it. The U.S. Supreme Court has recently concluded that the pre-trial right to counsel is not to "mold police conduct" or "mandate a code of behaviour for state officials" but is rather a personal right granted to an accused to guard against a coercive abridgement of the right against self-incrimination.[77]

If it is a personal right, the only relevant inquiry is whether the accused understood the nature of the right and the consequences of abandoning it. Accordingly, the Court held that the actions of the police in deceiving the accused's attorney, by informing her that it was unnecessary to attend at the station because no interrogation was to take place, could not affect the validity of the accused's waiver. In addition the police failed to inform the accused that his attorney desired to speak with him. The impropriety of the police deception was not of juridical significance in assessing the exercise of the personal right of the accused. The court held:

> No doubt the additional information would have been useful to respondent; perhaps it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.[78]

The essence of the right is choice and it is of little consequence to the state if rights-bearers consistently act to their detriment, even if the cause of the harm is partially attributable to the actions of state officials.

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[76] *Ibid.* at 302.
[77] *Moran* v. *Burbine*, 106 S. Ct. 1135 (1986).
[78] *Ibid.* at 1142.

D. TRIAL AND APPEAL

There are many different facets of the trial process that can be waived or forfeited. Some elements of trial process are so obviously related to forensic strategy that it is senseless to approach them as waivers of rights. For example, we speak of a right to cross-examine witnesses, and, in fact, this is a claim-right that will warrant appellate relief if the opportunity to exercise the right is denied;[79] however, this right can be exercised or forgone according to the strategy of the defence. Very few people would question the propriety of allowing a waiver of this right. Accordingly, some trial rights will be exempt from the following analysis. We will return to these accepted instances of waiver later in the paper when we attempt to distinguish between rights that are properly subject to waiver and rights that are inalienable.

In 1982 the Supreme Court of Canada noted that some procedural safeguards that apply at trial are waivable and others are not. They drew the distinction as follows:

> Some procedural safeguards are enacted for the protection of the rights of one of the parties, Crown and accused, and others for both. A party may waive a procedural safeguard enacted for his benefit, the concurrence of both being required when enacted for both....Paramount to such a right is that of a trial judge to require compliance notwithstanding a desire to waive, he being the ultimate judge of what procedural safeguards need nevertheless be respected in order to protect the certainty and the integrity of the trial process.[80]

Despite this pronouncement there is no judicial barometer to measure when a right has been enacted solely for the benefit of the accused, and when a right has been enacted for both accused and Crown. The substantive question of which rights are waivable may be unclear. The Supreme Court, however, was quite clear on the standard to be employed to measure the validity of a purported waiver of rights at trial:

> ...any waiver is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.[81]

It is important to note at the outset of an examination of the various procedural safeguards applicable at trial that adversarial justice allows the accused to choose his or her mode of trial.[82] The *Charter* guarantees a right to

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[79] It is a denial of natural justice to deny the opportunity to exercise the right to cross-examine. See, e.g., *Re Durette* (1979), 47 C.C.C. (2d) 170 (Ont. H.C.).

[80] *Korponay* v. *Attorney General of Canada*, [1982] 1 S.C.R. 41 at 48.

[81] *Ibid.* at 49.

[82] This choice is codified in the election and re-election provisions of the *Criminal Code* - ss. 464, 490-495.

trial by jury for offences punishable by five years or more (s.11(f)). However, the accused need not elect to be tried in this manner. For most offences, the accused is furnished with a choice of trial by provincial court judge, trial by judge alone, or trial by judge and jury. This choice or election does not violate the right to trial by jury because it is considered a valid instance of waiver.[83] If the offence is murder then an election for a non-jury trial must be supported by the concurrence of the Crown and is subject to the approval of the court.[84] For whatever reason, Parliament has deemed that a jury trial for the offence of murder is a procedural safeguard that was enacted for the benefit of both Crown and accused. Notwithstanding the obvious seriousness of the charge, it is unclear why a jury trial is a benefit to both parties only in this circumstance.

Parliament has recognized that the accused's choice of mode of trial must be restricted, and the *Criminal Code* allows the Attorney General to force the accused to be tried by a jury.[85] This restriction on choice does not violate the *Charter*, and the Attorney General may act without giving any reasons or affording the accused an opportunity to protest.[86] In effect, it has been recognized that the trial process affects interests other than those of the accused, but there has been no attempt made to articulate when these interests are activated.

Similar confusion surrounds the right of the accused to attend his or her trial. Section 577 of the *Criminal Code* requires that the accused be present throughout the trial. This is a jurisdictional requirement that cannot be waived by an accused who decides that his presence is not necessarily an advantage.[87] However, an accused may choose not to attend his preliminary inquiry, but this absence needs the concurrence of the prosecutor because it has been held that attendance is for the benefit of both the Crown and the accused.[88] It is unclear why attendance at the preliminary is waivable with Crown concurrence but attendance at trial is not. Presumably, trial attendance is not waivable because the personal presence of the accused satisfies a public interest in the appearance of justice. Why this interest is absent at the preliminary is not clearly articulated. It cannot be argued that waiver by concurrence is acceptable at the preliminary hearing because this requirement is not a matter of public interest but rather is only a safeguard enacted for the benefit of both accused and the prosecutor as litigant. The Ontario Court of Appeal has held that "the Crown Attorney does not participate in a criminal trial as an 'individual'. He participates as a representative of the Crown, which

[83] *R.* v. *McGann*; *R.* v. *Charters* (1986), 16 W.C.B. 260 (N.B. Q.B.).
[84] See section 430 of the *Criminal Code*; *R.* v. *Ettinger* (1986), 17 W.C.B. 362 (N.S. C.A.).
[85] S. 498 of the *Criminal Code*.
[86] *R.* v. *Musitano* (1983), 2 C.R.R. 324 (Ont. H.C.).
[87] *R.* v. *Dunbar and Logam* (1982), 68 C.C.C. (2d) 12 (Ont. C.A.); *R.* v. *Dumont* (1984), 37 C.R. (3d) 399 (Sask. C.A.); but see also *R.* v. *Belrose* (1987), 17 W.C.B. 276 (B.C. C.A.).
[88] *Re McLaughlan* (1986), 24 C.C.C. (3d) 256 (Ont. C.A.).

in turn represents the state, i.e. organized society."[89] Therefore, one cannot distinguish between rights that are waivable, non-waivable, and waivable with concurrence on the basis of the interests of the Crown as litigant. Reference must be made to the collective public interest, yet it is impossible to develop a criterion for establishing when the public is interested or when it is indifferent.

The fundamental right to be present illustrates that non-waivable rights may still be lost through forfeiture. The United States Supreme Court found that it is constitutional to bind, gag or exclude an obstreperous defendant,[90] and it justified this practice as an incident of waiver:

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights..., we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behaviour, he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom.[91]

The U.S. Supreme Court appears to conflate waiver with forfeiture and the failure to distinguish the two can lead to confusion. It must be understood that "the significant difference between waiver and forfeiture is that a defendant can forfeit his defences without having made a deliberate and informed decision to relinquish them, and without having been in a position to make a cost-free decision to assert them. Unlike waiver, forfeiture occurs by operation of law without regard to the defendant's state of mind."[92] In assessing the validity of waiver, the focus is on the knowledge and understanding of the accused, whereas the constitutional validity of forfeiture depends upon whether the deemed abandonment of the right is an appropriate and proportionate response to the defendant's misconduct.

In the Canadian context, the *Criminal Code* allows a judge to conduct a trial in the absence of the accused if the accused absconds during the proceedings.[93] The *Code* states that the accused shall "be deemed to have waived his right to be present at his trial". The Ontario Court of Appeal upheld this provision as constitutional on the basis that absconding constitutes a waiver of the right to be present.[94] Despite the reference to waiver, it is

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[89] *R.* v. *Stoddart* (1987), 59 C.R. (3d) 134 at 146 (Ont. C.A.) [hereinafter *Stoddart*].

[90] *Illinois* v. *Allen*, 397 U.S. 337 (1970).

[91] *Ibid.* at 343.

[92] Westen, "Away From Waiver: A Rationale For The Forfeiture of Constitutional Rights in Criminal Procedure" (1977) 75 Mich. L.Rev. 1214.

[93] Section 431.1(1)(a) of the *Criminal Code*.

[94] *R.* v. *Czuczman* (1986), 49 C.R. (3d) 384 (Ont. C.A.): *R.* v. *Tzimopolous* (1986), 29 C.C.C. (3d) 304 (Ont. C.A.).

clear that the court was aware that this provision was in fact an instance of forfeiture by operation of law. It appeared to be aware of the necessity to find that the forfeiture was a proportionate response to the misconduct when it indicated that the right to be present is not an absolute right and must "be measured against the corresponding rights of others and of society in the due administration of justice".[95]

An accused who absconds stands not only to lose the right to be present but, by operation of law, he is disentitled from having a trial by jury upon his return to the jurisdiction.[96] The Ontario Court of Appeal held that this particular practice was unconstitutional.[97] The Court praised the institution of trial by jury and commented that:

> [H]istory demonstrates that the right of trial by jury not only is an essential part of our criminal justice system but also is an important constitutional guarantee of the rights of the individual in democratic society. In all common law countries it has, for this reason, been treated almost sacrosanct and has been interfered with only to a minimal extent.[98]

This glowing praise might lead one to believe that trial by judge and jury is such an integral part of the criminal justice system that there is a public interest in not allowing accused individuals to waive the safeguard. But, the court construed the right as a choice "given to an accused which prevails unless he or she chooses not to utilize it by electing another mode of trial".[99] Accordingly, waiver of the right is permitted. Forfeiture, however, is not allowed—the court simply concluded that "Charter rights cannot be destroyed in this fashion".[100] Nevertheless, the Court recognized that a forfeiture of constitutional rights may be a reasonable limitation upon rights as contemplated by section 1 of the *Charter*. In this case it was held that there was no evidence that the forfeiture was necessary to achieve the compelling state objective in the administration of judicial interim release. Other appellate courts have struck the balance differently and have held that forfeiture is a proportionate response because the absconding accused is not entitled to impose an obligation upon the state to empanel a jury a second time, unless he can provide a reasonable excuse for unnecessarily putting the state to the time and expense the first time around.[101]

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[95] *Czuzman, supra*, note 94 at 388.
[96] Section 526.1 of the *Criminal Code*.
[97] *R.* v. *Bryant* (1984), 42 C.R. (3d) 312 (Ont. C.A.).
[98] *Ibid.* at 332.
[99] *Ibid.* at 322.
[100] *Ibid.* at 323.
[101] *R.* v. *Crate* (1983), 7 C.C.C. (3d) 127 (Alta. C.A.) [hereinafter *Crate*]; *R.* v. *McNabb* (1986), 55 C.R. (3d) 369 (B.C. C.A.).

The state need not only provide you with a jury if so requested, but it must ensure that you are brought to trial within a reasonable time. The *Charter of Rights* guarantees a trial within a reasonable time (s.11(b)), but early jurisprudence suggested that one is only entitled to the right if one asserts it.[102] A requirement of assertion operates as a waiver by omission, that is, if the individual fails to make a claim then the right is lost. As indicated in the introduction, the Supreme Court of Canada in *Mills*[103] held that this right is a personal right that does not affect the jurisdiction of the court. Consistent with the view that the right is personal, the Court held that the right is subject to waiver; however, they converted the waiver from one of omission to an active and informed relinquishment of the right. A waiver cannot be inferred from silence or from the omission to assert the right in a timely fashion. The waiver must be clear and unequivocal and articulated with full knowledge of the right and the effect waiver will have on the right.[104]

The impact of waiver is clear: "delay which is requested, caused by, or consented to, by the accused should normally be excluded from consideration when assessing the reasonableness of the overall period of the delay".[105] If the time period is unreasonable, after having excluded delay that has been consented to by the accused, then the court must stay the proceedings.[106] In light of the drastic nature of the remedy, it appears that courts will scrutinize the record in an attempt to find any defence concession that can be construed as waiver. The following ambiguous exchange is an example of the attempt of the courts to fit the interaction into the framework of an informed waiver:

> THE COURT: All right. September date?
>
> MR. BARHYDT: I'm free.
>
> MR. RICHARDSON: I wish to confirm that Mr. Bloomenfeld would be agreeable to that.
>
> MR. MAUBACH: I'm agreeable
>
> MR. BARHYDT: Considering my friend's statements earlier, I can indicate on behalf of Mr. Morse and myself that we were prepared to proceed on the fifteenth of this month.
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> THE COURT: All right.

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[102] *R.* v. *Beason* (1983), 36 C.R. (3d) 73 (Ont. C.A.).

[103] *Supra*, note 4.

[104] *R.* v. *Heaslip* (1983), 36 C.R. (3d) 309 (Ont. C.A.); *Mills*, *supra*, note 4 at 544-547.

[105] *Mills*, *supra*, note 4 at 545.

[106] In *Mills*, *supra*, note 4 and *Rahey*, *supra*, note 8, a majority of the S.C.C. agreed that a stay of proceedings was the most appropriate remedy for this type of violation.

> MR. MAUBACH: Likewise, Your Honour, with respect to Mr. Gugliotta, we were prepared to proceed.
>
> THE COURT: All right.[107]

From this exchange the Ontario Court of Appeal was able to find a waiver that would justify the three year delay in prosecuting charges of extortion and related offenses.[108]

An informed waiver will most likely be found if counsel for an accused consents to an adjournment. The Supreme Court of Canada has noted that "where an accused, represented by counsel, has requested, or consented to delay, waiver of such delay may be deemed clear and unequivocal with full knowledge of the rights and of the effect the waiver will have on the rights".[109] This is a surprising approach because the courts must surely be aware that counsel may agree to an adjournment for reasons that have little to do with the client's appreciation of the right. Adjournments are commonly consented to because the lawyer is unprepared to commence, the lawyer is double-booked or the lawyer is prepared to be cooperative with the Crown as an exercise in good public relations.[110]

The role of counsel in the criminal process poses a unique conceptual problem for the law of waiver. The *Charter* does not explicitly guarantee a right to be represented by counsel at trial, but recent case law is moving in the direction of recognizing a right to state-funded counsel.[111] This right is seen as indispensable in a system that is mystifying to the uninitiated. Despite the recognition of the key role counsel plays in securing a fair trial, the courts have also recognized a right to self-representation or, conversely, the right to waive the right to counsel.[112] The respect given to a decision to forgo the assistance of counsel is premised upon the perceived goal of furthering the autonomy of the defendant:

> Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the state, will

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[107] *R.* v. *Askov* (1987), 37 C.C.C. (3d) 289 at 298 (Ont. C.A.) [hereinafter *Askov*].

[108] Contrary to the clear rulings in *Mills*, *supra*, note 4, and *Rahey*, *supra*, note 8, requiring that a waiver be clear and unequivocal recent cases seem to be retreating from this position, and as in the *Askov* case, *ibid.*, they are scrutinizing the record carefully to see if the accused failed to assert her right. See *R.* v. *Smith* (1988), 42 C.C.C. (3d) 194 (Man. C.A.).

[109] *Mills*, *supra*, note 4 at 545.

[110] For a general discussion of the organizational pressures that force defence counsel to sacrifice the interest of the client for better relations with other court officials, see Blumberg, "The Practice of Law as a Confidence Game: Organizational Co-optation of a Professional", (1966-7) 1 Law & Soc. Rev. 15.

[111] See, *R.* v. *Rowbotham* (1988), 25 O.A.C. 321 at 363-371 (Ont. C.A.).

[112] *Faretta* v. *California*, 422 U.S. 806 (1975); *R.* v. *Bowles and Danyluk* (1985), 21 C.C.C. (3d) 540 (Alta. C.A.).

> bear the personal consequences of a conviction. It is the defendant, therefore, who must be free to personally decide whether in his particular case counsel is to his advantage. And although he may conduct his own defence ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law".[113]

The foundation for the practice of waiver stands on shaky ground. We respect the defendant's choices to further his sense of dignity and autonomy; yet, we allow the defendant's choices to be exercised by an advocate even though we do not take the added precaution of ensuring that the advocate's exercise of the right is based upon the genuine choices of the defendant. This is not a problem unique to counsel's consent to an adjournment. The incoherency of the foundation is readily apparent from an examination of attempts by accused to withdraw guilty pleas and the reluctance of appellate courts to grant relief based upon errors committed by counsel.

The guilty plea is the most dramatic manifestation of waiver. The panoply of procedural safeguards at trial can be circumvented by this admission of guilt. Chief Justice Laskin alluded to the sweeping nature of this waiver:

> A plea of guilty carries with it an admission that the accused so pleading has committed the crime charged and a consent to a conviction being entered without any trial. The accused by such a plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt, abandons his non-compellability as a witness and his right to remain silent and surrenders his right to offer full answer and defence to a charge.[114]

At common law the defendant was not encouraged to avoid trial by pleading guilty,[115] and in contemporary practice in Europe a guilty plea is an unavailable option.[116] In Europe, an accused's confession of guilt is only one factor to be taken into account by the judge in determining if guilt is proved in *dubio pro reo*.[117] The confession of guilt may expedite the trial but a trial is held nonetheless. Without recourse to the guilty plea, and in light of the principle of compulsory prosecution, the practice of plea bargaining is virtually unknown in Europe.[118] In Canada, 90% of criminal cases result in pleas of guilty and it has been noted that "plea bargaining has replaced the

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[113] *Faretta*, *supra*, note 112 at 834.

[114] *Adgey* v. *R.*, [1975] 2 S.C.R. 426 at 440.

[115] Langbein, "Understanding the Short History of Plea Bargaining" (1979) 13 Law & Soc. Rev. 261 at 264.

[116] *Ibid.* at 267; Stepan, "Possible Lessons From Continental Criminal Procedure", in *The Economics of Crime and Punishment* (1976) at 189-190.

[117] For a discussion of this standard of proof, see Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases" (1967-8) 77 Yale L.J. 880.

[118] See discussion in articles cited in notes 55, 56, 115, 116, 239 and 246.

traditional adversary trial process in the majority of cases dealt with by urban courts".[119]

Plea bargaining has become so entrenched that Crown and defence counsel feel compelled to adopt this expedient as a major part of their forensic strategy. The efficiency of the practice is rewarded through a system that incorporates a sentencing differential: that is, a guilty plea immediately entitles one to a reduction in the expected sentence. If lawyers are enamoured of this method of quickly disposing of cases, there is a danger that accused individuals may be coerced or tricked into playing the game. Courts are reluctant to entertain this possibility of coercion, and they take comfort in the approach of the U.S. Supreme Court to a claim of coercion where a defendant was threatened with an indictment under the Kentucky *Habitual Criminal Act* if he did not agree to plead guilty to a charge of uttering. The defendant refused to play the game and instead of the two to ten year sentence permitted on a charge of uttering, he received the life sentence required by the habitual offence statute. The court made the following remarks:

> Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned....Plea bargaining flows from the mutuality of advantage to defendants and prosecutors each with his own reasons for wanting to avoid trial....Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation....Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of a plea bargain.[120]

Surely there is a public interest in ensuring that accused individuals are only convicted upon proof of guilt beyond a reasonable doubt, and that upon conviction they receive a sentence that is proportionate to their guilt. However, this public interest is not considered strong enough to displace the practice of waiving the trial and allowing the sentence to be determined by a process of negotiation and not by a conception of just desert. As with other instances of waiver, the practice seems less objectionable when we insist upon a standard that the waiver be made knowingly and intelligently. However, even this legitimating standard is not employed with full force. The Supreme Court of Canada has approved of the statement that "it cannot be said that where...an accused is represented by counsel and tenders a plea of guilty to

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[119] The Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services Canada, 1986) at 406.

[120] *Bordenkircher* v. *Hayes*, 434 U.S. 357 at 361-363 (1977).

non-capital murder, the trial judge before accepting it is bound, as a matter of law, to interrogate the accused".[121] So long as counsel indicates that her client is willing to plead guilty, the court need not inquire as to whether the client is fully informed of her rights and the consequences of the plea. Even in the United States, where there is a statutory duty upon the trial judge to inquire into the decision to plead guilty,[122] studies show that the reforms have "left the coercive character of plea bargaining intact".[123]

On appellate review the court is reluctant to allow an individual to withdraw his or her plea after the individual has had time to deliberate upon the decision to plead guilty and has decided that the decision was made in haste. There are some cases in which an appellate court has allowed a withdrawal of the guilty plea upon proof of undue pressure from counsel,[124] but it must be remembered that the vast majority of accused people do not apply to have their plea withdrawn. Even those that do apply and submit affidavits chronicling the pressure exerted by counsel to accept the Crown's offer may be met with indifference from a court that concludes that "the appellant has had experience with the courts. It is not suggested that he did not know the nature of the charge or the effect of his plea."[125]

An accused will not be permitted to withdraw a guilty plea simply because the expected bargain was not received. A perverse notion of *caveat emptor* applies to foreclose the possibility of the accused backing out of a deal that does not bear fruit. This business of waiving rights is indeed a risky one. The trial need not accept the joint sentencing submissions of counsel and the accused is not permitted at this point of revelation to change his mind.[126] In addition, the Attorney General is permitted to appeal any agreed-upon sentence because the overriding public interest in just sentencing cannot allow the state to be bound by the bargaining decision of a mere representative of the Crown.[127] It is truly mystifying that the public interest in the fitness of a sentence is not strong enough to oust the practice of waiver through plea bargaining but is strong enough to allow state repudiation of the negotiated results of the practice.

The decision as to how to exercise rights is for the most part made by counsel on behalf of the rights-bearer. We accept these decisions at face value

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[121] *Brosseau* v. *The Queen*, [1969] S.C.R. 181 at 190.

[122] Rule 11 of the *Federal Rules of Criminal Procedure*.

[123] McDonald, "Judicial Supervision of the Guilty Plea Process: A Study of Six Jurisdictions" (1987) 70 Judicature 203 at 215.

[124] See *R.* v. *Lamoureux* (1984), 13 C.C.C. (3d) 101 (Que. C.A.).

[125] *R.* v. *Sode* (1974), 22 C.C.C. (2d) 329 at 334 (N.S.C.A.). Less egregious examples of appellate refusal to permit withdrawal of a guilty plea can be found in *R.* v. *Stark* (1986), 17 W.C.B. 325 (N.S. C.A.); *R.* v. *Rubenstein* (1987), 3 W.C.B. 260 (Ont. C.A.); *R.* v. *Lennie* (1986), 17 W.C.B. 321 (N.W.T. Terr. Ct.).

[126] See, e.g., *Rubenstein*, *ibid.*

[127] *R.* v. *Dubien* (1982), 27 C.R. (3d) 378 (Ont. C.A.); *R.* v. *Wood* (1976), 26 C.C.C. (2d) 100 (Alta. C.A.).

and rarely does a court inquire whether the rights-bearer was allowed to participate in the decision. Appellate courts are loath to overturn convictions on the basis of poor decisions made by counsel.[128] Courts have even gone as far as to admit that "an accused must surely assume responsibility for the actions of his own solicitor. To put it another way, I think that the mistake of the solicitor must be regarded as the mistake of the client."[129] Appellate courts will not allow the admission of fresh evidence if they conclude that the lawyer was not diligent in his failure to acquire this evidence at trial.[130] Accordingly, appellate courts may invoke the "no miscarriage of justice" proviso and dismiss an appeal based upon the consideration that counsel did not object to an error committed at trial.[131] In addition, there is no basis for reversal on appeal based upon a claim of "ineffective assistance of counsel".[132] There are many obstacles facing an accused who is dissatisfied with the decisions made by counsel as to how to exercise his rights. These obstacles are constructed despite the evidence indicating that:

> Seldom are attempts made to ascertain whether the accused understands. Given that the accused rarely speaks or is given an opportunity to speak, it is highly unlikely that a benevolent, well-meaning court would have any knowledge of the accused's comprehension. Rather than the court attempting to make the proceedings comprehensible, the onus is on the accused to inform the court that he does not understand. However, given the anxiety and stage fright that most accused suffer, this is unlikely. Carlen documents that even when asked if they understand, accused are reluctant to say no because they feel powerless, they don't want to appear incompetent, and/or they are too nervous to say anything.[133]

E. SANCTION

Despite the prevalence of waiver during investigation and at trial, in sentencing the practice of waiver drops out of the picture. An accused may be

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[128] In the United States there is mild appellate review on the grounds of ineffectiveness of counsel; see Vanburen, "The Ineffective Assistance of Counsel Quandary: The Debate Continues" (1984-5) 18 Akron L.R. 325. However, in Canada, there has not emerged a similar doctrine, except for a brief reference in *R.* v. *Garolfoli* (1988), 27 O.A.C. 1 (Ont. C.A.). The American doctrine operates upon a presumption that "counsel's conduct fell within the domain of professionally reasonable assistance" (at 329).

[129] *R.* v. *Behr*, [1967] 3 C.C.C. 1 (Ont. Dist. Ct.).

[130] *Palmer and Palmer* v. *R.* (1979), 50 C.C.C. (2d) 193 (S.C.C.).

[131] See, e.g., *R.* v. *Guenot* (1979), 51 C.C.C. (2d) 315 (Ont. C.A.); *Imrich* v. *R.* (1977), 34 C.C.C. (2d) 143 (S.C.C.); *R.* v. *Deol* (1981), 58 C.C.C. (2d) 524 (Alta. C.A.); *R.* v. *Bowles* (1974), 16 C.C.C. (2d) 425 (Ont. C.A.).

[132] Vanburen, *supra*, note 128.

[133] Ericson and Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press, 1982) at 186. At 189 the authors claim that "the inability of the accused to comprehend the proceedings was in some cases partially attributable to the lawyer".

able to negotiate with the Crown over the suggested sentence, but the actual choice of sentence is completely within the discretion of the court. The *Charter* constrains the force of state power to punish by proscribing cruel and unusual punishments and by proscribing being punished twice for the same offence. There may be some residual influence of the personal rights model in the interpretation of these rights. For example, when Gary Gilmore was content to accept his sentence of death, his mother was denied standing to appeal because the court refused to recognize not only the concrete injury to Gilmore's mother but also society's collective interest in "ensuring that state authority is not used to administer barbaric punishments".[134] However, the model of personal rights is largely abandoned at the time of imposition of sentence. I do not believe that anyone has claimed that in the interests of autonomy one can waive the right to be free from cruel and unusual punishment.

There are many possible explanations for the abandonment of a conception of personal rights and the associated practice of waiver at this stage of the proceedings. One can assert the primacy of the rights attendant at this stage, or the symbolic importance of prohibiting barbarity even upon consent. These arguments, however, will be left for discussion later in the paper. The explanation to be provided at this point relates to the logic of the adversary system. The key to understanding the practices of waiver, forfeiture through misconduct, and bargaining over rights that occur prior to conviction is revealed in this pronouncement of Chief Justice Burger of the U.S. Supreme Court:

> Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.[135]

Adversarial justice is premised upon party presentation of a dispute to a neutral arbiter. Neutrality is secured not only by the trappings of judicial independence but by conceiving of the arbiter as a passive umpire. Judges are instructed to "keep out of the battle" and allow the litigants to conduct their cases as they wish. One of the explanations for the divergence between common law reliance upon waiver and Continental rigidity in procedural forms is that: "in common law systems, the parties (through their counsel) perform a number of activities that are intrinsic to the office of the judge on the Continent. Thus, while the waivers and stipulations of Anglo-American

[134] *Gilmore* v. *Utah*, 429 U.S. 1012 at 1019 (1976).
[135] *Estelle* v. *Williams*, 425 U.S. 510 at 518 (1976).

litigants mainly affect their own forensic conduct, similar transactions would affect ingrained patterns of judicial behaviour in Europe."[136]

Upon conviction, the judge is no longer required to maintain her passive posture, and the litigants are no longer entitled to adopt the procedural forms that best suit their interests. The fact that procedural safeguards at the stage of sanction are not waivable forces one to question the justification for the dispensability of safeguards at the earlier stages of the process. The passive/active characterization of judicial behaviour is purely explanatory and is not immutable.[137] In fact, recent trends suggest that judges are encouraged to become more active at trial by advancing any defences that may have not been raised by defence and by aiding the unrepresented accused in conducting her defence.[138] There is a growing recognition that the criminal process is such an integral part of the enterprise of defining the structure of the state/citizen relationship that it is no longer proper to allow the litigants to define the balance and exercise of power.

Liberal ideology has molded adversarial criminal proceedings, and it has advanced a view of rights that sees the right as a "loaded gun that the rightholder may shoot at will in his corner of town".[139] The prevalence of waiver is partially attributable to the liberal preoccupation with self-sufficiency and individuality. In order to offset this "loaded gun" mentality it is necessary to explore a conception of rights that acknowledges collective ownership of a right—legal rights that are no longer the individual "trump" over collective interest,[140] but rather rights that are constitutive of the structure of state authority over its residents.

III. WAIVER'S SHAKY FOUNDATION

It is hoped that the preceding discussion has demonstrated the prevalence of waiver and related practices. It must be noted that the discussion did not identify a uniform doctrine. Rather it identified at least three variations on the

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[136] Damaska, *supra*, note 12 at 101.

[137] As Lamer J. said in *Brouillard* v. *R.* (1985), 17 C.C.C. (3d) 193 at 196 (S.C.C.), "it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges". For a general description of the passive/active dichotomy see Damaska, "Structures of Authority and Comparative Criminal Procedure" (1975) 84 Yale L.J. 480 at 523-526.

[138] See *R.* v. *Huebschwerlen* (1964), 45 C.R. 393 (Y.T. C.A.); *R.* v. *Rolls* (1981), 62 C.C.C. (2d) 208 (Ont. C.A.).

[139] Unger, *supra*, note 6 at 597.

[140] Dworkin speaks of rights as operating to trump the utilitarian concerns of the public interest in his book, *Taking Rights Seriously* (London: Duckworth, 1977). His perception of rights is the conventional, liberal vision of possessive individualism and this is revealed at p. 172 where he states that "rights-based...theories... place the individual at the center".

theme: first, the strict standard waiver in which the mental state of the waiving party is examined to determine her level of understanding and deliberation; second, the lenient standard waiver which is based upon an objective assessment of the facts to determine if the interaction was free from coercion; and third, forfeiture by operation of law in which the prior actions of the rights-bearer are examined to identify if she is disentitled from claiming her rights. There is no coherent rationale for discovering when strict standard, lenient standard, or forfeiture is to apply. This paper, however, will not be concerned with developing a criterion for applying these varying standards. Rather, we will define waiver in an all-embracing general manner as "a judicial finding that an action taken with respect to a particular right represents a decision not to assert the right",[141] and with this definition as a starting point we will attempt to expose the shaky foundation on which the entire practice of losing rights is balanced.

The notion of waiver has its roots in an economic conception of the world.[142] Self-interested and rational persons structure their lives as they choose by entering a marketplace of goods to bargain and negotiate in their best interests.[143] One need not know anything about Pareto optimality and transaction costs to know that the economic analysis has no application in a marketplace for incorporeal goods. The economic conception of law has a surface attraction when we are debating the distribution of Blackacre or the proper value of a horse, but when we turn to incorporeal goods like justice, truth, equality, and freedom there is something deeply disturbing about allowing one person to determine the value of these goods in a marketplace.

Waiver allows one person to set the price for the purchase of constitutional rights. The waiving party may be getting something of value, a reduced sentence or a psychological release by confessing guilt, but we have now moved into a realm of public interest and we should not be as concerned with satisfying a party's private interest. The proper orientation is to downplay the private interest—to realize that the rights preserved in the *Charter* are not the personal rights of the accused but the rights of everyone. The mistaken attribution of personal rights to particular accused persons partially explains

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[141] Rubin, "Towards a General Theory of Waiver" (1981) 28 U.C.L.A. L.Rev. 478 at 484-5.

[142] Economic analysis has been applied to rights-theory (Coleman and Draus, "Rethinking the Theory of Legal Rights" (1986) 95 Yale L.J. 1335) and to the rules of criminal procedure (Easterbrook, "Criminal Procedure as a Market Theory" (1983) 12 J. of Legal Studies 239). The economic theories of criminal justice are soundly rejected in this paper; however, an expanded critique will not be pursued. Simply stated, Easterbrook's view that criminal procedure "facilitates a market assessment and imposition of the price of crime" (at 330-1) is rejected as this characterization bears no resemblance to a criminal process that I, and other practioners, have worked in.

[143] Easterbrook, *supra*, note 142 at 291, notes that "large groups of people act as if each person is a rational maximizer of his satisfaction".

the common public response to the exclusion of evidence or to other procedural barriers to conviction which the public bemoans as "escaping on a technicality". It is understandable for a member of the public to feel that a suspected murderer is not deserving of personal rights, and the presumption of innocence is far too counter-intuitive to appease this sense of improper desert.

All this confusion can be avoided by returning to the simple notion that legal rights are possessed in common. If the right is collective in nature then it is difficult to justify individual bargaining sessions over the price of justice. One has to be exceptionally naive to argue that an accused bargaining over his sense of personal justice has no effect upon other people's sense of personal justice. One need only speculate over the way in which the establishment of a proportionate range of sentence is skewed by the deep entrenchment of plea bargaining to understand how waiver has an impact on persons other than the parties to the transaction. It is clear that "the fact that we permit a portion of defendants to waive trial rights by pleading guilty...undoubtedly renders it more difficult for any particular defendant to assert his right to trial".[144]

Incorporeal goods cannot be the subject of marketplace valuation. It is not because everyone has a uniquely subjective perception of the value of incorporeal goods like justice, but because the presumed rights-bearer is not really a bearer but a trustee. For the good of the public at large an accused is not considered the owner of the right but an idle beneficiary. Legal rights are not personally owned; they are a definition of the personal status of a given individual when she enters a legal transaction. Once entering the transaction the rights-bearer can no longer shed her skin. Whether for good or bad, we have decided that once an individual becomes an accused person it is no longer the prerogative of the individual to claim or renounce the good that defines her status in order to satisfy her perceived needs and self-interest.

In the past decade there has emerged a heated debate between those who seek to revitalize the liberal conception of rights and those who seek to infuse law with a communal spirit. In trying to escape the isolation of liberalism's atomistic conception of social organization, we now encounter exotic reformulations of social and political life based upon "Maines's status relationships, Tonnie's gemeinschaft, Gluckman's multiplex relationships, and Blau's intrinsic exchanges".[145]

The recent and relentless debate currently being staged by academics, pitting communitarianism against an aging and stale liberal ideology, has served at least one purpose. There are many who are convinced of the

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[144] Dix, "Waiver in Criminal Procedure: A Brief for a More Careful Analysis" (1977) 55 Texas L.Rev. 193 at 219.

[145] Hamilton and Sanders, "Punishment and the Individual in the United States and Japan" (1988) 22 Law and Society Rev. 301 at 306.

shortcomings of liberal thought,[146] yet there are few who wholly embrace the communitarian vision, because it remains uncertain what exactly the communitarian would be embracing. The vision of community is not programmatic and many of its formulations attract skepticism from those who are not carried away by the nostalgia of a feudal gemeinschaft or the promise of a caring and sharing utopia.

Nevertheless, there is something emotionally and intellectually satisfying about remedying the austere individuality of liberal thought with communitarian ideals—a legal structure premised not upon atomism but upon a unity of human relationships. Concepts such as alienation, reification, or commodification may appear too cerebral to be convincing, but modern culture appears to confirm that many people experience life in a "compulsively repeated existential sequence".[147] Liberal ideology and its accompanying social structures may be founded "on the self-directing power of the personality",[148] but the utter subjectivity of pure liberal epistemology has been unable to fulfill its promise of the power of personality.

If community is to replace individuality as the animating thought behind social institutions, then it is necessary to begin instantiating the content of community. Having already established the link between the pervasive practice of waiver and liberal thought, it is now necessary to undertake the task of replacing the notion of constitutional rights as property rights with a vision of collective or communal rights. A communal or collective right is not an unknown entity in the history of the common law. It was present in past common law rules prohibiting the waiver of the sparse grant of rights accorded our ancestral criminal defendants,[149] and it has recently re-emerged, in the face of substantial opposition, in labour law.[150] This notion of a collective right is a simple direction to the arbiter of any dispute over rights to take into consideration the impact any decision may have on the interests of persons other than the individual litigants. Put simply, "an individual who

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[146] Karl Klare has stated that "in particular, liberal political theory does not possess a coherent theory of rights" in "Critical Labour Law Theory: A Comment" (1981) 4 Industrial Rel. L.J. 450 at 468. The critique of liberal rights has come from all perspectives: critical legal studies, e.g., Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L.Rev. 205; feminist, Olsen, "Statutory Rape: A Feminist's Critique of Rights" (1984) 63 Texas L.Rev. 387; and socialist, Campbell, *The Left on Rights: A Conceptual Analysis of the Idea of Socialist Rights* (London: Routledge and Kegan, 1983).

[147] Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1983-4) 62 Texas L.Rev. 1563 at 1568. The repeated existential sequence is comprised of "desire for connection - memory of loss - anxiety - self-falsification" (at 1568).

[148] L. Hobhouse, *Liberalism* (New York: H. Holt, 1911) at 123.

[149] See Dix, *supra*, note 144 at 217-8.

[150] See Lynd, "Communal Rights" (1983-4) 62 Texas L.Rev. 1417; Klare, *supra*, note 146. Again, it must be noted that the collective right has emerged in areas of language and aboriginal rights; however, this paper will not discuss these types of collective rights that attach to definable groups.

sought to exercise a right that has been categorized as communal might be told that the right was not his or hers to exercise, for it was vested only in some group or collective representative, or in society at large".[151]

A defining feature of a collective right is its inalienability and its rejection of waiver doctrines. The direction to an arbiter to take into account a collective interest in rights adjudication is not startling—most judges would claim that they already take into consideration the "public interest", however narrowly it may be defined. What is startling is the disabling of the rights-bearer from exercising the right as he or she might desire.

Restriction of an individual's exercise of a right, even when it originates in the good intentions of a paternalistic state, is alien to our legal culture. The sophisticated liberal need no longer espouse the infinite worth of the individual to justify the retention of personal, contractarian rights. One need only point to the dangers of submerging the individual to the power of the group, however worthy the end may be, in order to support the claim that it is necessary to retain individually-exercised rights that are precisely designed to offset domination by a powerful group. This fear is what makes one hesitant to embrace collective rights with their accompanying rigidity of non-waiver.

But it turns out that collective, non-waivable rights are not so foreign in actual practice. In private law, presumably the bastion of liberal worship of the primacy of the individual, there are growing instances of non-waiver of legal rights. Rules relating to employment standards and rules relating to the avoidance of unconscionable contracts all question the individual's ability to consent to the temporary abandonment of legal rights.[152] With the emergence of the welfare state there came recognition that individuals meeting in the market place did not stand on equal footing, and it was necessary to protect less-endowed individuals with inalienable rights that could not be appropriated by the powerful through claims of legitimate consent.

Most non-waivable statutory rights that are of recent vintage are premised upon two related concepts. First, there is the ubiquitous reference to a "public interest" which may or may not be related to a communal or collective interest.[153] The public interest relates to the desire to ensure uniformity of public policy. A stated goal of guaranteeing a minimum wage for workers would be thwarted if a given worker could opt out of the protection. One need

[151] Lynd, *ibid.* at 1422.

[152] Numerous statutory rights now have a built-in non-waivability clause, see *Consumer Protection Act*, R.S.O. 1980, c. 87, s. 34(2); *Employment Standards Act*, R.S.O. 1980, c. 137, ss. 3 & 4; *Occupational Health and Safety Act*, R.S.O. 1980, c. 321, s. 2(2); *Landlord and Tenant Act*, R.S.O., c. 232, s. 82(1).

[153] The public interest may not approximate a collective interest or residents because public interest argument extends to state interests. For example, the creation of offences of strict liability is premised upon a notion of public interest; however, this interest may be nothing more than the interest of the state in efficient regulatory compliance.

only think of the exploitation at the turn of the century of immigrant workers who would work for wages far below what residents would expect. This image is at once the epitome of free market competition and a violent image of domination. Therefore, the free market had to be restricted so that certain bargains would not be respected in any circumstances. The universality of the program was a vital aspect of the program's success.

Not only does a "public interest" require universal, non-waivable application, but there is a second related factor. If the occurrence of opting-out or waiving is predictably low, then the public interest may not be so reliant upon universality. However, in areas governed by non-waivable statutory rights, we may presume that the parties do not have equal bargaining strength. Therefore, because the stronger party will know that he can easily secure consent from a party that really has no other options, we cannot assume a predictably low occurrence of waiver. In other words, a discretionary claim-right will be transformed into a mandatory immunity-right[154] when the public interest demands universality of application and when the structure of private relationships is such that one would always second-guess the voluntary and informed nature of consent.

Presumably, any discussion of a skewed balance of advantage and a public interest would direct one's attention to the criminal process. This is an area of law that has been commonly characterized as pitting the awesome power of the state against an individual who is poorly-equipped for battle.[155] Surprisingly, this is one area of law which has not been rigorously subjected to a critique of personal, waivable rights. It is necessary now to examine the reasoning that has been employed to retain waivable rights in the constitutional context while more and more statutory rights are being elevated to the status of inalienable rights.

The shaping of practice by an underlying ideology is rarely a self-conscious undertaking. For an ideology to be effective it must become so inculcated in the believer that it appears natural and beyond question. Accordingly, it is difficult to find examples in legal practice of explicit attempts to justify the ideology of personal rights and waiver. Fortunately, the celebrated right to trial by jury presents an opportunity for analysis because at common law this right was considered non-waivable. Therefore, it was necessary for courts to make some attempt to justify the transition of this right to its current waivable status.

In 1930, the U.S. Supreme Court was faced with the claim that a conviction could not be upheld when it was entered by a jury of eleven instead of twelve. In *Patton v. U.S.*[156] a trial proceeded with eleven jurors due to one juror

[154] See discussion of mandatory right, *infra*, note 212.
[155] See *supra*, note 11.
[156] 281 U.S. 276 (1930) [hereinafter *Patton*].

becoming incapacitated. The accused consented to this modified jury, but on appeal he complained that his consent was inconsequential as the right to trial by jury was not a right that was waivable at his pleasure. The court accepted that consenting to an improperly constituted jury was tantamount to waiver of the entire right, but it upheld the practice of waiving the full operation of the right.

Much of the case dealt with arguments about the history of the Sixth Amendment and the original intent of the framers of the American constitution. However, the court went far beyond justifying waiver by this elusive search for original intent. The court recognized that the common law prohibited waiver of trial by jury, but it considered this common law doctrine a reflection of the savagery of earlier criminal process:

> The ancient doctrine that the accused could waive nothing was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted. It arose in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty or some other grievous punishment out of all proportion to the gravity of his crime. Under such circumstances it was well, perhaps, that such a rule should exist, and well that every technical requirement should be insisted on, when the state demands its meed of blood.... Thanks to the humane policy of the modern criminal law we have changed these conditions.[157]

Surely, it is a weak argument to claim that a right is inalienable when times are tough, and expendable when times are better. Presumably, a right exists as an anchor that remains fixed and does not shift with the vagaries of the evolution of social institutions. If the jury was considered a valuable fact-finding institution when the system meted out rough justice then surely it must still possess this value in modern times. In any event, I doubt that many would be convinced that our modern process has reached a level of perfection that obviates the need for a protected right to a jury trial.

However, there is another facet to the common law rule that warrants examination. The court noted that historically a conviction had an adverse impact upon other people in addition to the accused. A right of waiver could not be permitted because the system "operated to outlaw and to attaint the blood and to work a forfeiture of official titles of inheritance, *thus affecting the rights of third parties*"[158] (emphasis added). In other words, the ancient right to trial by jury was a collective right that required consideration of the rights of other individuals. With the abandonment of sanctions of forfeiture and outlawry, the court had then to consider whether the modern practice of

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[157] *Ibid.* at 307-8.
[158] *Ibid.* at 296.

trial by jury "is to guaranty a right or establish a tribunal as an indispensable part of the government".[159]

It is implicit in the court's formulation of the issue that a right is always a personal one that is subject to the whims of the rights-bearer, and only in the event of the law operating such that the rights-bearer's choices may affect others will the right be transformed from a mere right to an "indispensable part of the government structure". The ideology of market place justice prevented the court from recognizing that an abstraction, such as the community or collective interest, could satisfy the need for finding an adverse impact on others. Such a finding was necessary for the right to be considered an indispensable part of the government structure. Without a concrete manifestation of adverse impact, the court had no difficulty justifying the practice of waiving the right.

First, the court was perplexed by the notion that an accused can waive altogether his right to trial by entering a guilty plea, yet not be able to waive one facet of a trial upon a plea of not guilty. Accordingly, the court found that a power to waive trial by jury was a logical extension of the greater power to waive the entire proceedings. This reasoning illustrates the unconscious infiltration of the underlying market ideology—the waiving of the trial proper may have become institutionalized, but it is also a practice that has yet to be justified. It is a weak justification to piggyback one right upon another right that has yet to be fully justified. Even if the right to waive the trial has a self-evident justification, it is misleading to categorize all rights as containing the same general properties, as this creates a version of what Hegel calls "the night in which...all cows are black".[160]

The conclusion that legal rights in general are personal ones designed solely for the benefit of the individual rights-bearer needs further justification. Far from being self-evident, this conclusion is, in fact, incoherent. Its incoherence is manifested in cases that attempt to map the contours of the *Patton* right to waive trial by jury. In 1964 the U.S. Supreme Court was faced with a challenge to the practice of requiring prosecutorial or judicial consent to a defendant's decision to waive trial by jury. If *Patton* established that the right is personal and its exercise is subject to the personal preferences and interests of the accused, then it seems anomalous to require state approval of the choice. However, in *Singer v. U.S.*[161] the court concluded that "the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right".[162] In other words, an accused who does not wish to be tried by a jury cannot insist that he be tried by judge alone. The accused is not

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[159] *Ibid.* at 288.
[160] Lynd, *supra*, note 150 at 1421.
[161] *Singer* v. *U.S.*, 380 U.S. 24 at 161 (1964).
[162] *Ibid.* at 34-5.

empowered to choose a bench trial because "the Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the government regards as most likely to produce a fair result".[163]

At once the incoherence of the liberal formulation of rights becomes apparent. On one hand the right is deemed personal and waivable because, unlike the position at common law, the court concludes that the defendant's exercise of the right does not adversely affect other individuals. On the other hand, the waivability of the right is restricted in light of the conclusion that the state has an interest in the defendant's exercise of the right.[164] On one hand, personal choice is granted to facilitate the autonomy interest of the defendant, and on the other hand, the autonomy interest is subordinated to the state or public interest. This inconsistency is reflected in Canadian Charter jurisprudence as well. Appellate courts have noted that the constitutionally entrenched right to trial by jury does not "make trial by jury obligatory and can only be read as requiring that an accused have a choice".[165] This assertion is in accord with liberal notions of rights that fixate on furthering autonomy and individual self-sufficiency; however, the Canadian courts have succumbed to the incoherence of the *Singer* position.

In *R. v. Turpin*,[166] the Ontario Court of Appeal was faced with the problem that the *Criminal Code*, at the time, allowed waiver of jury trials for murder cases only in Alberta. At Turpin's trial the judge allowed the accused to waive this right and have a bench trial. The Ontario Court of Appeal declared the trial a nullity and concluded that forcing an accused to have a jury trial or premising the waiver of this right upon the consent of the Attorney General was not an unconstitutional practice. The court stated:

> Even if we assume that trial by jury in a murder case is a benefit only to the accused (and not to the Crown, representing the public), we do not see how he can waive that benefit.... The granting of the benefit does not mean the converse, namely, that the accused necessarily has a right to decline the benefit or to have the benefit of not being tried by jury.... We agree that in this country also the government (i.e. the Crown) has a legitimate interest in the method of trial of the most heinous of crimes.[167]

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[163] *Ibid.* at 36.

[164] It is problematic to ascribe rights to an abstract entity such as the state (see *Stoddart*, *supra*, note 89) and it is likely that the state interest in merely a convenient expression for some form of public interest. Nevertheless, it becomes even more problematic to have the state exercise the rights of the public because, presumably, the defendant is a more proper custodian of the rights. See discussion in Bandes, "Taking Some Rights Too Seriously: The State's Right to a Fair Trial" (1987) 60 Southern Calif. L.Rev. 1019 at 1045-1050.

[165] *Crate*, *supra*, note 101 at 129-30.

[166] (1987), 60 C.R. (3d) 63.

[167] *Ibid.* at 67-68.

Without a proper justification, and suffering from internal incoherence, the waivability of rights becomes supported simply on the basis of expediency. The court, unable to explain fully the phenomenon of rights waiver, is forced to shift the burden upon those who are opposed to this atomistic and self-interested view of rights. For example, in *Patton* the court shifted the burden by reflecting on the dangers of allowing complete individual control over the exercise of rights and concluding that there is no evidence of harm created by the practice:

> There is not now, and never was, any practical danger.... Such a theory, at least in its application to modern American conditions, is based more upon useless fiction than upon reason. And when the idea of giving countenance to the right of waiver, as something necessary to a reasonable protection of the rights and liberties of accused, and as something intended to be practical and useful in the administration of the rights of the parties, has been characterized as involving innovation "highly dangerous", it would..."have been much more convincing and satisfactory if we had been informed why it would be highly dangerous."[168]

If the courts will refuse to justify waiver, and insist upon shifting the burden to those who advocate the abolition of the practice, then it is time to accept the invitation to show how waiver may be a dangerous practice.

IV. THE DANGERS OF WAIVER

In addressing the issue of the dangers of waiver it is necessary to perform a delicate balancing of the value of waiver against perceived dangers. At the outset it must be noted that "one clear advantage of permitting waivers is that they are a way of minimizing costs".[169] There can be little doubt that waiving the obligation of the state to obtain a warrant to search, or waiving right to counsel at an interrogation, or waiving the necessity of proving guilt after a formal trial all serve to reduce the costs of the administration of justice for the state. Administrative convenience is always a factor to be considered in deciding whether to maintain an institutional practice; however, it is a factor that should carry little weight when balanced against concrete injury to individuals engaged in the practice. While keeping the factor of decreased cost in the background, we should turn to the impact of waiver on individuals to determine whether the U.S. Supreme Court was right in considering the claim of danger to be a useless fiction.

Courts are aware that waiver of rights poses unique problems for the achievement of justice. This is why the courts always warn that where

[168] *Patton*, *supra*, note 156 at 296.
[169] Rubin, *supra*, note 141 at 488.

"fundamental rights" are at stake "courts always indulge every reasonable presumption against waiver".[170] This reluctance to embrace fully any purported waiver of rights is related to the claim by Marshal J. of the U.S. Supreme Court, in the context of evaluating consent searches, that "no sane person would knowingly relinquish a right to be free from compulsion".[171] The apparent irrationality of foregoing the exercise of one's rights signals two related dangers inherent in the practice of waiver. First, there is the question of whether the waiver of rights in the context of the criminal process actually secures any benefits for the rights-bearer, and second, there is the question of whether a court can realistically ascertain if the prerequisites for a valid invocation of waiver are present, that is, if the waiver is truly voluntary and informed.

Waiver may be dangerous in that it promises to secure benefits for cooperative rights-bearers while in actual fact it can only deliver the benefit of administrative convenience to the state. In general one would assume that there is a rational motivation for a rights-bearer to decide not to insist on her rights. It must be recognized that rights "are peculiarly relevant to conflicts between the will of one party and the contrary will of some other party"[172] and, within this confrontational model of rights, there may be a good reason for not desiring to assert one's rights. It is said that "rights are harmful because insisting upon one's rights can be disruptive by transforming loving and caring relationships into impersonal and antagonistic ones".[173] Therefore a waiver of rights can serve to avoid transforming relationships into adversarial battles. This may be true of conflict between private individuals who may desire to continue their relationship after the conflict has been resolved; however, this conciliatory approach has little relevance to the criminal process in which an adversarial relationship between state and individual is presupposed. We do not have a "family" model of criminal process,[174] and for better or worse, we assume that the best method for resolving an accusation is to encourage the litigants to battle it out as adversaries. In any event, it is anomalous to conceive of a state/individual relationship as a long-standing, continuous one that should be fostered by a conciliatory approach to rights. Once the conflict is resolved the state always does remain a part of the individual's life, but not in a manner of a private relationship in which the second party interacts with

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[170] *Aetna Ins. Co.* v. *Kennedy*, 310 U.S. 389 at 393 (1937).

[171] *Schneckloth*, *supra*, note 40 at 281.

[172] Wellman, *A Theory of Rights* (New Jersey: Rowman and Allanheld, 1985) at 195.

[173] *Ibid.*

[174] A family model of criminal process was articulated by Griffiths, "Ideology in Criminal Procedure or a Third Model of the Criminal Process" (1970) 79 Yale L.J. 359, in response to previous models that assumed an "irreconcilable disharmony of interest" (at 367) between state and citizen. Griffiths starts from "an assumption of reconcilable - even mutually supportive - interests, a state of love" (at 371). Whether this model is or is not of value, it is surely just normative and not at all descriptive.

the rights-bearer on a regular basis and in which the second party can award future benefits based upon a previous rapprochement.

If the individual cannot benefit through waiver by avoiding transforming a future relationship into an adversarial one, then it is possible that the rights-bearer may receive tangible benefits within the context of the present conflict. This is a most difficult argument to sustain. What possible benefit can an individual receive by cooperating with the police and allowing them to unreasonably seize incriminating material? What possible benefit can an individual receive by waiving the right to counsel and providing incriminating statements? Of course, one may say that an individual who confesses receives a psychological release or may in fact be able to strike a deal of immunity. This is true; however, the individual could receive the same benefit without having waived the right. The psychological release may be muted if the individual must await consultation with counsel but it is there nonetheless—in addition, an immunity deal can and should be negotiated in the presence of a counsel who can advise the individual as to the merits of the proposed deal. With some rights, i.e. the right to be tried within a reasonable time, it is impossible to ascertain the concrete benefit that should accompany the waiver, and with other rights benefits are imaginable but remote.[175]

Even without identifying tangible benefits that accompany a waiver, one may still argue that there is the intangible benefit of increasing the autonomy of the rights-bearer. The rights-bearer may suffer the loss of rights without accompanying benefit, but the decision was hers. Her autonomy and freedom of choice have been respected. The system is structured to give an impression of an institution that is open to manipulation by the accused—this image is consistent with liberalism's obsession with widening the sphere of autonomous choice. In addition to the self-evident, intrinsic value of autonomy, liberalism could also make a great legitimating claim: "a fair process need only guarantee that you participate in your demise". All critical choices in the process are left in the hands of the accused—how to present a defence, what admissions to make, what type of jury to choose and whether to even exercise any of the rights. So, in responding to an inscrutable jury verdict of guilty, an accused cannot complain that she was unjustly treated. So long as the accused was adequately informed to enable a genuine, informed choice then it is not open for the accused to complain later if things turn out not quite as planned or expected.

The ultimate irony of liberalism's claim of a benefit of fostering autonomy is that the rights which can lead to developing autonomy and control are usually

[175] The waiver of one's right to trial appears to have real benefit because of the sentencing differential applied to guilty pleas. However, one must remember that the judge may not follow a proposed lower sentence and that the Attorney General can still appeal a negotiated sentence. Even if the benefit is not considered too remote in light of these factors, there is still the ethical question of whether the sentencing differential is a justifiable benefit.

exercised on behalf of the accused by a disinterested but partisan lawyer.[176] Presumably, for the sake of protecting the finality and sanctity of the verdict, we consider the lawyer's choices as the accused's own. This attribution of choice is done without any real consideration of whether the accused participated in the decision. Accordingly, we can never really be certain that an improvident waiver of rights could at least serve to foster the autonomy of the rights-bearer.

The presence of professional advocates, both in defence and prosecution, seriously impairs the image of the criminal process as a market in which rights-bearers freely negotiate over the price to attach to their exercise of rights. The presence of "key players" who are not buying and selling on their accounts leads to a "problem of agency costs determining how each agent can be given an incentive to act in the interests of his principal".[177] Fostering autonomy is virtually impossible if vital decisions are being exercised by official agents who may be operating under an agenda that differs from that of the rights-bearer. Despite the problem of agency costs, the process remains firm in its commitment to respecting the lawyer's decision as a decision made by the rights-bearer. The only restriction placed upon waiver in the marketplace of justice is a timid form of judicial review to ensure that rights have been waived knowingly or voluntarily. Here we encounter a second danger related to waiver: not only are we uncertain whether the waiving party has secured any benefit, but the elusiveness of the benefit makes it virtually impossible to truly ascertain if the waiver was voluntary.

It has been noted that "voluntariness is an unwieldy notion which is not amenable to direct assessment and whose use in waiver cases has been a source of continuing confusion".[178] It is easy to draw an inference of voluntariness if we can see the actor's decision as being purposive and directed to the obtaining of some valued benefit. Without evidence of benefit we are left wondering why the actor would choose a less advantageous course of action, and this wondering is easily transformed into a suspicion that the actor was misled or coerced into action. At a minimum we could displace this suspicion of involuntariness by requiring that all waivers be preceded by a notification to the rights-bearer of all her legal options and the relative advantages and disadvantages of each option. Despite the "knowing and intelligent" requirement for some waivers, few courts have ever insisted upon this useful flow of information to the rights-bearer. The warnings required under s. 10(b) of the *Charter* and pursuant to the *Miranda* case come close to providing this flow of information, but even they are fatally flawed. Courts require police to advise persons under detention that they may consult counsel because the inherent

[176] See discussion in text accompanying notes 109-113 and 128-133.
[177] Schulhofer, "Criminal Justice as a Regulatory System" (1988) 17 J. Legal Stud. 43 at 49-61.
[178] Rubin, *supra*, note 141 at 530.

coerciveness of the interrogation makes it difficult for a court to determine after the fact if any decision to waive the right to remain silent was voluntary. However, one can then waive the right to counsel; nothing has changed in the coercive environment that would make us any less suspicious of the voluntariness of this waiver.

The presence of counsel not only raises the problem of agency costs and how to ensure that counsel act in accordance with the interests of their principal, but their presence also skews the judicial determination of voluntariness:

> Because voluntariness is a meaningful concept only when applied to the mental processes of a single individual, it is rather difficult to apply to collective entities. The typical defendant in a criminal case, of course, is a collective entity composed of the defendant and his lawyer. In some waiver situations...the trial judge will be required to determine the perceptions and attitudes of a represented defendant. More often, however, the lawyer's actions will be imputed to his client, rendering the client's own knowledge and volition irrelevant.[179]

If waiver of rights were an isolated and infrequent phenomenon, we might be willing to tolerate the occasional unknowing and involuntary waiver for the sake of the utilitarian benefit of decreased cost; however, the earlier examination of the presence of waiver suggests that it is a pervasive practice. For many rights the frequency with which they are waived is unknown, but in two areas, guilty pleas and investigative searches, it is clear that waiver has replaced the traditional method of conducting searches and trials. Reliance upon waiver is bound to grow "because waiver is an effective device for reaffirming the existence of procedural rights in the abstract while finding them inapplicable to particular cases" and courts have therefore "pressed them into service with increasing frequency".[180]

The fact that increasingly prevalent waivers create an inexpensive and informal alternative to the formal adjudicatory process has a disturbing impact upon the coherent development of existing rights. For example, if the police have available an inexpensive and informal method for processing lawbreakers, then the courts may be reluctant to extend or fortify existing rights for fear that if the right becomes too onerous for the police then they may attempt to rely upon the informal process of waiver in every case. Recently, the U.S. Supreme Court lowered the standard for evaluating whether the police had probable cause to search, and one of the justifications for making the standard less onerous upon the police was that "if the affidavits submitted by police officers are subjected to the type of scrutiny some courts

[179] *Ibid.* at 531.
[180] Dix, *supra*, note 144 at 195.

have deemed appropriate, police might well resort to warrantless searches, with the hope of relying upon consent or some other exception to the Warrant Clause that might develop at the time of the search".[181]

The development of doctrine relating to unreasonable search in Canada and the U.S. illustrates the stultifying impact that waiver and related doctrines may have. One commentator has noted that courts, in assessing claims of unreasonable search, employ the "fallacious notion that privacy is an all or nothing proposition and that a person has no legitimate expectation of privacy concerning information partly exposed in a very limited way to a limited group".[182] An examination of the case law confirms this critique, and this all or nothing approach can be partially attributable to the logic of waiver. As discussed earlier, one can become disentitled from claiming protection of the constitutional right against unreasonable search if one assumes a risk of exposure by engaging in illegal activity, failing to take precautions against intrusion by others or by speaking and consorting with others. This doctrinal constraint upon the development of a sophisticated privacy right is a manifestation of the waiver-related doctrines of forfeiture and waiver by omission. By failing to assert your right you become disentitled to claim any vestiges of privacy. By allowing a notion of waiver by omission to circumscribe the development of the privacy right the court has created the anomalous scenario that the protection of the Constitution can only be extended to those who proclaim to the entire world that they do not want to be disturbed. If the individual relaxes somewhat by marginally exposing her privacy to a limited group then the court responds by concluding that the individual has forfeited her entire privacy right instead of reaching the more reasonable conclusion that the exposure has only lessened the expectation of privacy, thus reducing the scope of available safeguards.

The problem of total forfeiture of privacy rights may be more a product of the limited vision of rights as personal rights than the practice of waiver *per se*. Waiver is a practical manifestation of the vision of personal rights. The underlying vision needs remodelling in order to ensure that waiver does not operate to stultify the growth of constitutional rights. Before turning to a discussion of the viability of expanding personal rights into collective rights, there is one more point that needs be made about the dangers of waiver.

There are usually both practical and symbolic components of any given institutional practice, and one must wonder what ill effects waiver might have upon the symbolic importance of the criminal trial and due process. Presumably constitutional rights express a vision of the type of society we aspire to. A formal process encumbered by rights contributes to this

[181] *Illinois* v. *Gates*, 103 S. Ct. 2317 at 2331 (1983).

[182] Lafave, "Nine Key Decisions Expand Authority to Search and Seize" 69 A.B.A. J. 1740 (1983).

aspirational vision and the criminal process should play an integral part in the affirmation of shared values and ideals. By allowing the formal process, from investigation to trial, to be displaced by an informal process that is designed solely to accommodate the subjective interests of the participants we dilute the "norm production" value of the system.[183] Durkheim believed that ideals "could not survive if they are not periodically revived"[184] and it is doubtful that this revivification will ever take place in a criminal process that allows for a constant relinquishment of the ideals embodied in rights.

V. COLLECTIVE RIGHTS IN THE CRIMINAL PROCESS

The individualistic underpinnings of rights theory has been the subject of criticism since Marx proclaimed the primacy of communal *droits du citoyen*.[185] Traditional rights rhetoric with its perception of individuals as "separated owners of their respective bundles of rights"[186] may have been acceptable when the paradigm right was the right to property, but the modern promulgation of constitutional rights appears to require a different orientation. As indicated earlier, it is conceivable that this new orientation would revolve around a notion of collective rights that contemplates a joint ownership of rights. Two practical consequences emerge from this reorientation: first, collective rights introduce a new methodology for analyzing the scope and strength of a right, and second, the practice of waiver is virtually abandoned.

The new methodology introduced through collective rights will assist in curing the current restrictive analysis that is entailed by personal rights and waiver. Basically, this new methodology is just an elaboration upon a commonly-held intuition. In the course of debate about the justification for expanding rights held by criminal defendants, it is common to hear civil libertarians respond to the fears of law and order proponents by asking these opponents of rights to consider how they would feel if a member of their family were caught up in the criminal process without the protection of rights. This common rhetorical ploy of personalizing the debate in fact reflects the intuition that rights should not be simply seen as the property of disliked lawbreakers, but rather, as a protective shield that will apply to all regardless of our likes and dislikes. This intuition is captured in this recent pronouncement from the Law Reform Commission of Canada:

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[183] See Goodpaster, *supra*, note 11 at 140-146 for a discussion of a norm production theory of the criminal trial.

[184] Durkheim, "On the Process of Change in Social Values" in T. Parsons, ed., *Theories of Society* (New York: Free Press of Glencoe, 1961) 1305 at 1309.

[185] Lynd, *supra*, note 150 at 1435.

[186] Olsen, *supra*, note 146 at 393.

> The difficulty in understanding how rules pertaining to the judge's conduct of trial, to the prosecutor's professional responsibility, or to defence counsel's role and responsibility protect society, disappears if one recognizes that society is composed of the individuals within it and that the procedural laws which guarantee fairness to those charged with crime are laws which guarantee fair treatment to all of us.[187]

A firmly established conception of collective rights expands upon this intuition by demanding that an arbiter of dispute always consider how her interpretation of rights will affect rights-bearers who are not before the court. As discussed earlier, this may not seem to be a revolutionary claim, but when put in context of a specific legal problem it becomes clear that this methodology is a significant departure. The point can be best illustrated by examining the development of the law of search and seizure.

In 1974 Anthony Amsterdam suggested that there were two approaches to the interpretation of the Fourth Amendment guarantee against unreasonable search and seizure.[188] The current approach, which he called "atomistic", emphasizes personal privacy interests and the "protection of atomistic spheres of interest".[189] It was his view that this approach must be replaced by a regulatory one in which the constitutional guarantee is seen as a regulation of government conduct requiring "government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects against unreasonable searches and seizures".[190] The regulatory approach is consistent with the view that constitutional documents are basically anti-government documents that operate to restrain an insidious growth of state power. The regulatory approach recognizes that:

> The Bill of Rights does not envision an adversary proceeding between two equal parties.... But, the Constitution recognized the awesome power of indictment and virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution.[191]

The atomistic approach that is currently employed produces a restrictive approach to the right because it unduly focuses on the actions and entitlement of the rights-bearer. We have already seen how the courts have denied protection by claiming that a reasonable expectation of privacy does not exist for those who engage in illegal activity or for those who fail to take

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[187] Law Reform Commission of Canada, *Our Criminal Procedure* (Ottawa: The Commission, 1988) at 13.

[188] *Supra*, note 65.

[189] *Ibid.* at 367.

[190] *Ibid.*

[191] *Wardius* v. *Oregon*, 412 U.S. 470 at 480 (1973).

precautions to assert their right. The regulatory approach parallels the development of a notion of collective rights because it shifts the focus from the individual rights-bearer to the propriety of state action. The relevant inquiry is then on how this state action affects the rights of all rights-bearers. Instead of asking whether a specific criminal defendant has "assumed a risk" of invasion of privacy, the relevant question is what risks should residents be forced to assume in an open society.

The collective rights approach nurtures a strong constitutional right that is not dependent upon *ad hominem* qualifications. This is clear when we contrast the two approaches in the context of the question of the constitutionality of "beeper-monitoring".[192] In 1983 the U.S. Supreme Court addressed the issue of the propriety of using a radio transmitter to track the movement of a suspected drug dealer.[193] Using the atomistic, personal rights approach the court concluded that an individual driving on public streets has no reasonable expectation of privacy and, accordingly, the Fourth Amendment did not apply. This conclusion was based upon the reasoning that an individual travelling in public has voluntarily conveyed information concerning his movements to any onlooker, and there is nothing in the Constitution that prohibits state officials from augmenting their sensory faculties by the use of technology. The practical result of this conclusion is that the police need not have a warrant, nor need they have any articulable reason before they attach a radio transmitter to our personal possessions. The total abandoning of any safeguards raised a fear that this could result in "twenty-four hour surveillance of any citizen", but the court dismissed this fear in a cavalier fashion by stating that "if such dragnet-type law enforcement practices...should eventually occur, there will be time enough then to determine whether different constitutional principles apply".[194]

A collective rights approach might concede that there is a lessened expectation of privacy in a moving vehicle; however, it would not produce a result that totally abandons all safeguards. This is because "collective fourth amendment rights are measured in part by the effect of aggregated individual privacy losses on society's feeling of security".[195] When one focuses solely upon the actions and expectations of the defendant before the court, it is easy to conclude that the installation of a radio transmitter is no more invasive than conventional tailing. However, when one considers the future impact of the police action upon the collective security of all residents, it become obvious that beeper monitoring poses a threat that far exceeds conventional tailing. It must be recognized that "the efficiency of beeper monitoring may facilitate a

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[192] The following analysis is taken from Note, "Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights" (1985) 71 Virginia L.R. 297.

[193] *U.S.* v. *Knotts*, 103 S. Ct. 1081 (1983).

[194] *Ibid.* at 1086.

[195] Note, *supra*, note 192 at 321.

higher frequency of surveillance, and its technological nature may generate greater societal anxiety...and the knowledge of government surveillance creates an anxiety in individuals not under investigation that the state may treat them similarly".[196] Once the collective security of all residents is recognized as a pivotal factor then the court will be free to consider the impact of the state practice on associational freedom, on the collective inhibition of common activities such as wandering or strolling, and on the interest of residents in maintaining anonymity and freedom from attention.

The collective nature of constitutional rights is reflected in First Amendment jurisprudence. The overbreadth doctrine allows a speaker who is engaged in constitutionally prohibited speech to challenge a statute that is substantially overbroad in its application to others.[197] In other words, even if a particular defendant's speech is clearly covered by a prohibitory statute which is constitutional in its application to her speech, the speaker will still be allowed to mount a challenge to the statute in order to protect the interests of other speakers whose free speech rights may be chilled by the overly broad sweep of the statute.

Even if constitutional rights require consideration of the interests of the collective this does not lead inexorably to the conclusion that waiver and related doctrines are to be abandoned. The new methodology of analyzing rights by reference to collective interests does not impair the popular rights theory that views rights as "protected choices".[198] This theory, known as the choice, will or power theory, promotes the idea "of the right holder having the freedom to choose among a set of options, and of this freedom being protected by a set of duties imposed on others".[199] Modern rights theory sees a right as a complex of Hohfeldian positions that contains a core element and a protective perimeter of associated elements.[200] Regardless of whether we are dealing with a Hohfeldian claim right, power or immunity, "the unifying factor" is that "the law specifically recognizes the choice of an individual either negatively by not impeding or obstructing it (liberty and immunity) or affirmatively by giving legal effect to it (claim and power)".[201]

Under a power or will theory of rights, it is inconceivable to entertain a notion of an inalienable right because a decision to waive, sell, forgo or transfer the content of the right is the lifeblood of the right. Despite the rhetoric of the 18th century proclaiming the "inalienable rights of man",[202]

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[196] *Ibid.* at 317-318.

[197] See discussion in Lockhart, Kamisar and Choper, *Constitutional Law: Cases-Comments-Questions* 5th ed. (St. Paul: West, 1980).

[198] Sumner, *supra*, note 2 at 46.

[199] *Ibid.*

[200] See discussion in Wellman, *supra*, note 172 at 81-91.

[201] Hart, "Definition and Theory in Jurisprudence" (1954) 70 L.Q.R. 37 at 49.

[202] See D.T. Meyers, *Inalienable Rights: A Defense* (New York: Columbia University Press, 1985) at 183-196.

modern liberal rights theory has not been comfortable with inalienability and restrictions on the marketability of rights. Inalienability is an elusive concept: "sometimes inalienable means nontransferable, sometimes only non-saleable. Sometimes inalienable means non-relinquishable by a rightholder, sometimes it refers to rights that cannot be lost at all".[203]

Within the context of the criminal process the most appropriate conception of an inalienable right is that it "cannot be relinquished by the individuals who possess them".[204] It is a claim that "the consent of the rightholder is insufficient to extinguish the right or to transfer it to another".[205] In addressing the issue of whether inalienability of legal rights and the corresponding abandonment of the practice of waiver is a justifiable restriction of a right, it is important to note that one is not dealing with a claim that legal rights are absolute. In restricting the choice of the rights-holder one is not making the corresponding claim that inalienability means that a right is paramount and can never be overridden. In fact, most of the rights embodied by the *Charter* contemplate the possibility of a superior state interest outweighing the right. The question presented by the reorientation of rights as collective rights is whether, absent a superior state interest, the individual can voluntarily waive the application of the right.

This power theory of rights does not fit comfortably with the approach to remedying constitutional violations of legal rights in the criminal process. Presumably, the power theory contemplates a rational rights-bearer deliberating upon the costs and benefits of asserting her rights and ultimately deciding to claim her rights if she believes that litigation will provide her with adequate recompense for her rights-loss. However, the constitutional remedies for violation of rights are not altogether concerned with adequate recompense—the remedies extend far beyond what is necessary to compensate the aggrieved party.

The most common remedies under s.24 of the *Charter* for violation of the legal rights are either a stay of proceedings or the exclusion of evidence. In most cases the accused is the beneficiary of the chosen remedy, but this is not the intended distribution of the value of the remedy. For example, the court will still order exclusion of evidence even if the excluded evidence is insignificant and will have no impact on the trial. Exclusion of evidence may be similar to nominal damages in some cases because it doesn't bestow a benefit upon the claimant. The granting of this remedy without corresponding benefit is properly understood with reference to the other common remedy—the stay of proceedings. When the government violates our legal rights the

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[203] M.J. Radin, "Market Inalienability" (1987) 100 Harv. L.Rev. 1849 at 1850.

[204] Myers, "The Rationale for Inalienable Rights in Moral Systems" (1981) 7 Soc. Theory Pract. 127 at 127.

[205] Barnett, "Contract Remedies and Inalienable Rights" (1986) 4 Soc. Phil. & Pol'y 179 at 185.

court awards a remedy to nullify the actions of the state. The remedy is granted to wipe clean any vestiges of foul play. Unlike an ordinary right whose violation attracts a remedy of making the aggrieved party whole, the constitutional right requires a remedy that makes the entire process whole. The accused may benefit but this is an incidental by-product.

This is clear from examining the rhetoric employed in invoking exclusion of evidence as a remedy. The American courts "assert that the remedy is not for the individual at all, but rather is invoked for the benefit of society's interest in deterring government behaviour which violates the fourth amendment".[206] The Supreme Court of Canada has not embraced this deterrence rationale but it has noted that the decision to exclude is "grounded in community values" and is intended to preserve judicial integrity by avoiding "judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies".[207] If the remedy is grounded in collective values, and the remedy is regulatory in nature by being designed to maintain the balance of power between state and individual, then surely the right must be similarly conceived. A constitutional right should be seen as a method of structuring and regulating state power and once this unique element of constitutional rights is firmly grounded then it is possible to argue that "rights that are relational and systemic are necessarily inalienable: individuals cannot waive them because individuals are not their sole focus".[208]

Once we have recognized the "relational and systemic" content of constitutional rights it becomes easier to displace the popular power theory of rights with its rival theory, the interest or welfare theory. Whereas the power theory conceives of the rights-holder as an "active manager of a network of normative relationships", the interest theory conceives of the rights-holder as a "passive beneficiary of a network of protective duties shared by others".[209] Under this theory rights are protected interests, and the core element of a right is not the rightsholder's autonomous choice to pursue or abandon the right but rather is the beneficial interest which the law has deemed of sufficient importance to warrant normative protection. Redefining rights as protected interests and not protected choices may be more consistent with the collective underpinnings of constitutional rights; however, it does not necessarily advance the claim that the constitutional right is inalienable. If a right is designed as a benefit to the rights-bearer's interest then surely we should allow the rights-bearer to waive this right when she rationally believes that insistence upon the right will not advance her interests.

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[206] D. Dorenber, "The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment" (1983) 58 N.Y.U. L.Rev. 259 at 261.

[207] *R.* v. *Collins* (1987), 56 C.R. (3d) 193 at 208, 210 (S.C.C.).

[208] L. Tribe, "The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties and the Dilemma of Dependence" (1985) 99 Harv. L.Rev. 330 at 333.

[209] Sumner, *supra*, note 2 at 47.

In order to move justifiably from an interest theory of rights to a practice of inalienability, it is necessary to elaborate further upon the nature of the protected interest and the means chosen to protect the interest. This further elaboration will reveal that some constitutional legal rights are more properly conceived of as immunity-rights with their focus being upon the correlative state disability. The first step in this process is to recognize that the interest protected is not an individual self-interest. An interest worthy of protection is a good, attribute, endeavour or practice that is deemed conducive to the development of personhood. A particular individual may not desire this good or attribute but the good must still be protected because other individuals may see it as indispensable to the attainment of uniquely human goals. So long as the individual belongs to a class capable of being interested in the good then she is entitled to the right because:

> [T]he idea of [being] interested in something does not carry the implication of self-regarding concerns which goes with the narrow idea of interests as that which is for the benefit of A. What a person is interested in may often be some condition of himself, but it need not be. He may be interested in the development of knowledge, the welfare of others, artistic conceptions, sports, animals, foreign countries, and so on, none of which can be seen as tied up with his self-interest in the sense of self-regarding interests.[210]

This conception of interest is consistent with liberalism's belief in the subjectivity of value, but it does not embrace liberalism's obsession with personal choice. Certain rights may be detrimental if exercised by the rights-bearer, but this does not suggest that the rights-bearer can voluntarily renounce her possession of the right:

> Though rights are based on the interests of the rights-holder, an individual may have rights which it is against his interest to have. A person may have property which is more trouble than it is worth. It may be in a person's interest to be imprisoned, even while he has a right to freedom. The explanation of this puzzle is that rights are vested in rights-holders because they possess certain general characteristics: they are the beneficiaries of a promise, nationals of a certain state, etc. Their rights serve their interests as individuals with those characteristics, but they may be against their interests overall.[211]

The interests protected by the legal rights in the *Charter* relate to privacy, fair trial and freedom from arbitrary interference; however, these rights all relate to one overriding interest — the interest of all residents in ensuring that state power and authority remain constrained by the prescribed constitutional

[210] Campbell, *supra*, note 146 at 96.
[211] J. Raz, "On the Nature of Rights" (1984) 93 Mind 194 at 208.

limitations. The combined effect of the legal rights is to define the proper relationship between state and individual, and as such the primary interest is in maintaining the constitutive nature of the rights. This is not an interest that is subject to personal ownership; the integrity of the constitutional ordering of social relations is dependent upon the universality of its application. As indicated earlier with reference to welfare-state restrictions upon the free market, the universality of the program is a key ingredient to its success.

In effect, the reorientation of constitutional rights within the framework of an interest or welfare theory converts discretionary rights into mandatory rights.[212] For example, the right to an education (education being a protected interest) contemplates a right of children to attend school, but it also entails a duty to attend. It is in the interest of all residents to live in an educated society and "each person has a right that other persons be educated, and in virtue of the right that others have that he be educated, he has himself a duty to attend school".[213] Similarly, it is in the interests of all residents that the state respect its constitutionally defined boundaries, and thus the individual accused has a duty to claim all the attendant rights which define her status as an accused and which structure the authority of state power.

In the case of mandatory rights "duty and right are entirely coincident".[214] The gist of these rights is the imposition of duties and at times it is superfluous even to mention rights. However, it is not only the duty of the individual accused as trustee of the public interest that is vital. What emerges as the essence of legal rights is the obligation, duty or disability thrust upon the state. Most of the legal rights are "rights of recipience" and not "rights of action";[215] that is, the legal rights are not inherently exercisable. One cannot in a vacuum exercise one's right to counsel or one's expectation of privacy or one's right to a fair trial within a reasonable time. It is one's duty to insist upon these rights, but one does not insist upon these things until the state has taken measures to place her in the position of being a suspect or accused person. Even when the state has taken the necessary steps to make these rights relevant to the state/individual interaction, these rights remain nonexercisable because the accused is basically a passive recipient. The essence of a non-exercisable right is the corresponding duty that a second party must fulfill. The duty is paramount because "non-exercisable rights are not distinct from the obligations to which they correspond".[216]

A right to a fair trial and the right to be tried within a reasonable time are definitely non-exercisable rights; however, other rights, such as privacy and

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[212] For a discussion of mandatory rights, see J. Feinberg, *Rights, Justice and the Bounds of Liberty* (Princeton N.J.: Princeton University Press, 1980) at 232-238.

[213] *Ibid.* at 233.

[214] *Ibid.*

[215] This distinction is elaborated upon in P. Montague, "Two Concepts of Rights" (1984) 9 Philos. Public Affairs 372.

[216] *Ibid.* at 379.

freedom from arbitrary detention, cannot be considered pure rights of recipience because there is nothing that the state is obligated to provide. Rather, the state is disabled from invading your protected sphere unless certain prerequisites are established. Therefore, in addition to the rights of recipience, the legal rights of the *Charter* contemplate immunity rights. An immunity right secures a sphere of activity that others lack the legal power to change or invade. As Hart points out:

> The chief, though not the only employment of an immunity from adverse legal change which we may call an immunity right is to characterize distinctively the position of individuals from such adverse change by constitutional limitations or, as Hohfeld would say, by disabilities of the legislature.[217]

If a legislature is disabled from changing one's legal entitlement then surely its agents, police and prosecutor, cannot accomplish indirectly through waiver what could not be accomplished directly through legislation. As with rights of recipience, immunity rights speak more to the second party than to the rights-bearer who basically remains a passive beneficiary of the state obligation or disability. Waiver is more appropriately considered in relation to claim rights in which the right is not activated without action taken by the rights-bearer. With respect to passive rights the actions and decisions of the rights-bearer become less consequential and significant.

Accordingly, there are two ways of characterizing legal rights in the *Charter* and both characterizations make the state obligation or disability the salient factor. If this is so it is not difficult to support a conception of inalienable rights because the rights-bearer is no longer the focus of the right. If the right is fully defined by the corresponding duty or disability there is something disturbing about permitting the obligated party to escape its obligation by attempting to secure release by the intended beneficiary. The nature of the right requires the state to take action to satisfy its obligation or to restrict its actions to comply with its disability—the entire scheme is subverted if the state is first permitted to maneuver to secure a release from its obligations. It seems morally objectionable to promise something with the hope of being released from the promise at a later date.

The traditional approach to rights conceived of the right as the salient feature, and the duty logically followed or was justified by the establishment of the right. The duty, obligation or disability became an afterthought, and this was consistent with the common law's relegation of many duties to the supererogatory category. Duties, such as the contentious duty to rescue, were

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[217] Hart, "Bentham on Legal Rights", in A.W.B. Simpson, ed., *Oxford Essays in Jurisprudence*, 2nd series (Oxford: Clarendon Press, 1973).

left outside the scope of the law because the imposition of certain duties was seen as coerced benevolence or altruism. The liberalism of the common law seemed content with establishing the protective sphere of individual rights, and any movement towards the imposition of positive duties was viewed with suspicion. The modern history of international human rights covenants confirms this suspicion of duties, as many Western industrial nations were reluctant to affirm the existence of economic and social rights that impose affirmative obligations upon government.

Accordingly, the reorientation of constitutional legal rights with the increased salience of duties and disabilities is counter-intuitive for many theorists. As with the duty to rescue, an unconditional obligation upon the state to provide certain goods regardless of the rights-bearer's wishes is open to the objection that the scheme is unduly paternalistic. When the mandatory, collective rights in the Constitution are analogized to the mandatory right to education the potential paternalistic flaw is exposed. We agree that there is a duty to attend school, but this duty only applies to young people. Mandatory rights that are not waivable by the rights-bearer are acceptable when the rights-bearer does not have the capacity to rationally assess her self-interest. In fact, courts have already acknowledged that some of the legal rights of the *Charter* are not waivable when the defendant is a child;[218] however, the absence of a power of waiver for adult offenders is objectionably paternalistic. Some may argue that paternalism is not objectionable; however, most people try to avoid using paternalism as a ground or justification for legal intervention. Nevertheless, this objection is easily overcome.

First, the characterization of the scheme as paternalistic misconceives the nature of collective rights because the contention that "inalienable rights are paternalistically grounded... appears to rest on the assumption that whatever duties are implied by such rights, they are owed to the possessors of those rights".[219] Both the duty imposed upon the state and the duty imposed upon the individual to insist upon the right are not self-regarding duties—they are duties owed to society at large. The other-regarding nature of collective rights makes the claim of paternalism simply irrelevant. Even if one is not convinced that the duties owed by these rights are directed towards a collective beneficiary, it can still be argued that inalienable constitutional rights are not an example of true paternalism. Calabresi and Melamed, two theorists who appear committed to the ideology of the market, characterize constitutional rights as an exercise in the less objectionable practice of "self-paternalism": "it merely allows the individual to choose what is best in the long run rather than

[218] See, e.g., *R.* v. *H.* (1986), 19 C.R.R. 68 (Man. C.A.).
[219] T. McConnell, "The Nature and Basis of Inalienable Rights" (1984) 3 Law and Phil. 25 at 41.

in the short run, even though that choice entails giving up some freedom of choice".[220]

Whether the collective, non-waivable right is an exercise of true or self paternalism is not important because even those who believe in the logic of the market and universal commodification admit that paternalism can be allowed if it fits within the ideology of the marketplace. Generally, restrictions on alienability are condemned because they are economically inefficient; however, when a transaction might create significant "externalities" (i.e. costs to third parties) then inalienability may be allowed to correct for market failure.[221] Two arguments that address the concerns of anti-paternalists are the "prophylactic argument" and the "domino theory".[222]

The prophylactic argument concedes that free marketability is the norm; however, sometimes the nature of the good which the accused is trading "might arouse suspicion that her act is coerced".[223] The risk of harm of coerced transactions, and the great difficulty and cost in attempting to evaluate the voluntariness of every transaction outweighs the presumed harm of restrictions upon alienability. The thrust of this argument can be understood by reference to the claim that the right to life is inalienable. In most countries suicide is no longer prohibited by sanction, and this may suggest that the right to life is not inalienable because it is waivable. However, the inalienability of the right to life is directed towards proscribing agreements between parties to take the life of the other. Aiding and abetting suicide is still a criminal offence, and this facet of inalienability is acceptable because of a prophylactic argument:

> When only one party is involved the question of whether consent is genuine does not arise. But if one person is allowed to take the life of another simply because he has consented, this issue must be dealt with. And the obvious worry is that it will be difficult to determine whether any particular killing is one that was done with the consent of the victim or was cold-blooded murder.[224]

Similarly, it may be argued that the inherent coerciveness of most state/individual transactions makes it difficult to accept waivers as voluntary at face value. Related to this prophylactic argument is the domino theory which "envisions a slippery slope leading to market domination".[225] That is to say, allowing some rights to be commodified and market-negotiable may lead

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[220] Calabresi and Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harv. L.Rev. 1089 at 1113.
[221] *Ibid.* at 1111-1115.
[222] These terms are adopted from the insightful paper by Radin, *supra*, note 203 at 1909-1915.
[223] *Ibid.* at 1909.
[224] McConnell, *supra*, note 219 at 43.
[225] Radin, *supra*, note 203 at 1912.

to a gradual commodification of all rights. This theory assumes that it is important to maintain the purity of some rights, and that the slow movement towards admitting waiver into all facets of the criminal process will endanger the other rights that we believe should be free from infiltration by the market ideology. The denigration of rights under the domino theory is once again best illustrated by reference to the right to life:

> Allowing a person to kill another simply because the latter consents will create a moral climate in which the lives of all persons will be less secure. People may become hardened and less outraged when someone's life is taken. Such a society may eventually take less seriously a violation of a person's right to life. A legal system cannot, without great difficulty, both claim to place a high value on human life and allow some to kill human beings simply because they have consented.[226]

Legal rights under the *Charter* should be presumptively inalienable. It should not count as a justification for their infringement to point to the consent of the individual. First, it is not in the power of the individual to consent to abandoning the constitutional scheme because the rights are not personally possessed by this individual. Allowing individual consent to operate as a justification for constitutional violations adversely affects the interests of others in seeing that the state keeps within its constitutional boundaries. Not only does waiver harm other residents but it may harm the waiving party in light of the uncertainty of knowing whether a decision to forgo a right is truly voluntary and informed. Finally, the practice of waiver denigrates the significance of rights by conceiving of all rights as fungible and commodifiable. Constitutional rights are unique. They serve a function that is distinct from the design of private rights. Waiver becomes an unjustifiable practice once we clearly see constitutional norms as:

> Norms concerned with structuring power relationships to avoid the creation or perpetuation of hierarchy in which some perennially dominate others.... These norms serve not only to recognize spheres of personal autonomy, but also to replace vertically stratified patterns of power with more horizontal or egalitarian arrangements—between accuser and accused, between governors and governed, between the Union and the States, between those who hold power and those who aspire to it.[227]

VI. A BLUEPRINT FOR THE FUTURE

Waiver may be an objectionable practice when analyzed in general, abstract terms. However, a concrete examination of the various legal rights shows that

[226] McConnell, *supra*, note 219 at 53-54.
[227] Tribe, *supra*, note 208 at 333.

it is difficult to analyze them as a uniform group. Some rights are patently unwaivable, e.g. the protection against cruel and unusual punishment, and other rights seem patently waivable, e.g. the right to cross-examine witnesses. The preceding discussion attempted to provide a general critique of waiver, but now it is time to fine tune the analysis to accommodate the counter-examples of rights that are evidently waivable.

It would be absurd to suggest that an accused cannot waive her right to cross-examine. To force counsel to question every witness would convert cross-examination into an empty ritual. It is equally absurd to suggest that an accused can consent to being flogged or shackled, as the waiver of the right to be free from cruel and unusual punishment could lead to enormous barbarity. A criterion for determining which rights are subject to waiver and which are not can be deduced by trying to establish the features that distinguish the right to cross-examine from the right not to be subjected to any cruel and unusual punishment.

First, one can attempt to establish a lexical priority amongst rights, and state that some rights are too important or fundamental to allow for waiver. This methodology is doomed to failure because of the subjectivity of values. It may be obvious that the right to cross-examine is less fundamental than the right against cruel and unusual punishment; however, distinctions based upon importance and significance become blurry when we try to assess the relative importance of privacy, freedom from arbitrary detention and other rights. Attempting to employ a method of analytical deduction to decide which rights are indispensable for a just process and which rights are simply advantageous is beset with problems:

> There are two problems with this "conceptual-deductive" approach. First, no one has ever convincingly demonstrated that deductive analysis alone is capable of telling us why some rights are less "fundamental" than others.... But even assuming consensus could be achieved on some finely-tuned calibration of the relative "fundamentalness" of rights, there is a second difficulty with the deductive approach. It simply does not follow logically that because, e.g. due process is "less fundamental" than free speech, that therefore due process guarantees should be waivable.[228]

Perhaps, the right to cross-examine can be distinguished from cruel and unusual punishment in that the former is a "right of action", a "freedom to", whereas the latter is a "right of recipience", a "freedom from". Previously, it was claimed that non-waivability attached to passive "rights of recipience" because the salient and defining feature of this type of right was the attendant state obligation or disability. For these rights, the interests of the rights-bearer become submerged and juridically insignificant. This dichotomy of legal

[228] Klare, *supra*, note 146 at 476-477.

rights is an attractive criterion for analyzing waiver, yet there is one glaring omission. The right to privacy, as protected by the s. 8 guarantee against unreasonable search and seizure, seems to be both a right of action and a right of recipience. The right to be left alone suggests a passive right to receive, but there is also an element within the right that requires some assertions and actions to be taken to safeguard one's privacy. Considering that this constitutional right largely governs the entire investigatory process, its ambiguous characterization is too large a gap in the criteria of active/passive rights.

Another way in which the right to cross-examine and the right to be free from cruel and unusual punishment can be distinguished is by a functional analysis. Cross-examination is only valuable in an instrumental sense—artful cross-examination can aid in securing a fair trial. The right to be free from cruel and unusual punishment has intrinsic value; it is not designed to secure some other greater good. This right is purely designed to uphold respect for the dignity of the person. One can always take a particular good and infinitely regress to a position where this good is always seen as instrumental in securing another good; however, it is suggested that the regression is not useful once one has identified a good that pertains to personhood and human identity.[229] These goods, as controversial as they are, should be considered goods of intrinsic merit that do not require further justification by showing some instrumental value.

This distinction leads to an analysis of the legal rights of the *Charter* into core and derivative rights.[230] A right that is grounded in another is a derivative right. The core rights of the *Charter* all contain justification for their existence by virtue of their direct relationship with a protected interest. Derivative rights do not relate directly to a protected interest, rather their function is one of instrumentality—they facilitate the obtaining of the core right. The obvious example is once again the right to cross-examine. This right is derived from the core right to a fair trial. Respect for human dignity necessitates the existence of a right to a fair trial before the state can inflict punishment, but

[229] Radin, *supra*, note 203 at 1903-1909 takes the position that a good is non-commodifiable if the good is important to personhood and human flourishing.

[230] See Raz, *supra*, note 211 at 197-199. The core rights discussed in this paper bring to mind a liberal conception of rights that is premised upon the assertion of the intrinsic value of dignity and autonomy. If the core-derivative distinction amongst rights is in fact just another formulation of distinctly liberal values, then it may be reasonable to ask if the plea, initially advanced in this paper, to recognize constitutional rights as collective rights, is defeated by the retreat to recognizable liberal ground. First, it must be recognized that liberal and communitarian values do not stand in perpetual opposition—they are not logical opposites. Second, the potential impossibility of ever achieving a communitarian aspiration of inalienable rights must be recognized, and the demands of constitutional aspirations must be kept to a manageable level by limiting the rigours of non-waivability to core rights that are distinctly liberal is not a retreat to stale liberalism, but rather is a strategy to ensure the viability of reconceiving rights as having non-waivable, collective elements.

the right to cross-examine is justified solely by its utility in achieving the core right.

This distinction between core and derivative rights is consistent with another method of distinguishing waivable and non-waivable rights. Earlier, it was mentioned that one of the dangers of waiver was the elusiveness of a tangible benefit to the party that decides to waive. Accordingly, waiver would not appear dangerous if we could be certain that the waiving party is receiving some benefit, or at least is not losing some advantage. Edward Rubin has analyzed the propriety of waiver by looking for some "functional alternative" to the right being waived:

> The basic way in which this translation from formal to informal interactions can be achieved is to require that parties who waive a particular right obtain the functional equivalent of that right in the context of their more informal interaction.... Because a right is an essential part of the relationship, it can only be altered, in form, but not totally eliminated. In other words, rights being waived are structuring devices; they can be relinquished only if acceptable alternative means of structuring the relationship are employed.[231]

The waiver of a derivative right usually will not foreclose the possibility of there being acceptable alternative means of structuring the relationship. The decision not to cross-examine will not necessarily result in the loss of the core right of a fair trial. There are alternative methods, other than cross-examination, of ensuring that the state's guarantee of a fair trial is upheld. However, the loss of a core right is fatal. There are many paths that can be taken to reach the core right, but at the core is a dead end. Once the core is lost through waiver it is irretrievable.

Accordingly, it is necessary to provide a typology of legal rights that will divide rights into their core and derivative elements. I only intend to sketch an outline, in full recognition that this constructed typology needs to be expanded upon. A possible typology may be constructed in the following manner:

1) CORE RIGHT: THE RIGHT TO PRIVACY
Section 8 of the *Charter* guarantees the right to be free from unreasonable search and seizure by securing a reasonable expectation of privacy. Therefore, this right cannot be waived and the practice of consent search and wiretap is virtually abolished.

2) CORE RIGHT: THE RIGHT TO BE FREE FROM ARBITRARY INTERFERENCE WITH LIBERTY
Section 9 of the *Charter* guarantees the right to be free from arbitrary detention or imprisonment. Other rights are instrumental in securing this

[231] Rubin, *supra*, note 141 at 537.

right and these derivative rights are: (i) s.10 - the provision of information upon detention to assist the individual in assessing whether the detention is arbitrary — this includes the right to be informed of the reasons for detention, the right to consult counsel, and the right to test the detention by way of *habeas corpus*.

3) CORE RIGHT: THE RIGHT AGAINST COMPELLED SELF-INCRIMINATION

The *Charter* does not explicitly guarantee this right; however, judicial construction has introduced this right as a constituent element of fundamental justice under s. 7[232] and as a core right from which the s. 10 guarantee of right to counsel can be derived.[233] Support for a core right against self-incrimination can be found in the derivative rights under s.11(c) (the right not to be compelled as a witness) and s. 13 (the right of an accused not to have previous testimony used against her...in subsequent proceedings). An unusual feature of this core right is that it contemplates waiver by its very formulation - the right merely protects against compelled self-incrimination, not consensual self-incrimination. It is necessary to frame this right in this manner because making this core right non-waivable will result in conflict with another fundamental freedom; that is to say, freedom of expression requires that a person, for whatever reason, should be able to choose to speak to public officials even when the speech is incriminating.

4) CORE RIGHT: THE RIGHT TO A FAIR TRIAL

Section 11(d) of the *Charter* guarantees a trial before an impartial tribunal and a procedure by which guilt must be proved beyond a reasonable doubt. The impartiality of the tribunal and the burden of proof are the defining elements of this core right. Other subsections provide derivative rights that facilitate the fairness of the trial: (i) s.11(a) -the right to be informed of the specific offence; (ii) s.11(f) - the right to be tried by a jury; (iii) s.14 - the right to an interpreter.

5) CORE RIGHT: THE RIGHT TO RESPECT FOR ONE'S AUTONOMY AND DIGNITY

This vague prescription covers the largely unrelated rights that attempt to treat the individual as an end and not as a means to an end. This core right is in fact a group of core rights including: (i) s.11(g) - the right not to be punished for an offence not known to law at the time of the act or omission; (ii) s. 11(h) - the right not to be tried twice for the same offence; (iii) s. 11(i) - the right to the benefit of the lesser punishment if the prescribed punishment has been raised since the commission of the offence; (iv) the right to be free from cruel and unusual punishment.

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[232] *R.* v. *Wooley* (1988), 25 O.A.C. 390 (Ont. C.A.).

[233] That is to say most cases that discuss the right to counsel at interrogation assume that this right is useful by virtue of its being able to protect one's right to remain silent. The formulation of waiver of the right to counsel in *Clarkson*, *supra*, note 75, requires an awareness of consequences evaluation, and presumably this means that one can only waive the right to counsel if one is sufficiently aware that one has the right to exercise the core right to remain silent.

There are a number of loose ends that need to be mentioned. First, it is apparent that s. 7 (the right not to be deprived of life, liberty and security except in accordance with fundamental justice) and s. 11(b) (the right to be tried within a reasonable time) have not been placed within the typology. Section 7 has been omitted because it lacks a definable content and the Supreme Court of Canada has proceeded on the assumption that this section is a compendious expression of the specifically enumerated rights found in ss. 8-14 of the *Charter*.[234] Section 11(b) has been omitted because the Supreme Court of Canada is still struggling with the issue of whether a trial within a reasonable time is merely instrumental in securing a fair trial or whether it serves to reduce the attendant anxiety, stigma, and inconvenience while awaiting trial.[235] On the former interpretation it is a derivative right that is waivable and on the latter interpretation it fits within the core right of respect for autonomy and dignity.

In addition, the typology does not specifically address the issues of standing and forfeiture. Briefly, it is part and parcel of the conversion of personal rights into collective rights that the requirements for standing are virtually abolished. If the upholding of legal rights is in the interest of all then it stands to reason that anyone may launch an action for a declaration that certain state action is violative of the *Charter*. Unlike the dramatic modification of the standing rules, a notion of collective rights does not require the abolition of the practice of forfeiting rights by operation of law. In order to be a member of the collectivity that is protected by constitutional rights there may be certain membership qualifications. Misconduct may disentitle one from claiming the benefit of the collective right, and all the court need do is ensure that the qualifications for membership are rational: i.e. this is simply a paraphrase of the current approach, previously discussed,[236] in which the court undertakes a s. 1 analysis to determine if forfeiture is a proportionate response to the misconduct.

The consequence of this proposal is a dramatic reduction in the incidence of waiver. While the rights to trial by jury and to counsel remain waivable, the right to be free from unreasonable search and the right to a fair trial may not

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[234] The view that s. 7 is merely a compendious expression of the other specified rights was advanced in *Reference re s. 94(2) of the Motor Vehicle Act* (1986), 48 C.R. (3d) 289 (S.C.C.) and applied in *Mills*, *supra*, note 4 at 537. Recent invocations of s. 7 to invalidate abortion law (*Morgentaler, Smoling and Scott* v. *The Queen* (1988), 37 C.C.C. (3d) 449 (S.C.C.)) and constructive murder law (*Vaillancourt* v. *R.* (1987), [1987] 2 S.C.R. 636) suggest that s. 7 has a content far exceeding the specified prescription is ss. 8-14. However, it is far from clear how these decisions affect the interpretation of legal process rights.

[235] In *Mills* and *Rahey*, *supra*, notes 4 and 8, Lamer J. claims that 11(b) has nothing to do with fair trial, but most of the other judges have preferred not to classify Charter provisions into watertight compartments. A consensus relating to the rationale for this right has yet to clearly emerge.

[236] *Supra*, note 92-101.

be waived. This requires the abolition of consent search and wiretap, and most significantly, the abolition of pleading guilty and plea bargaining. Before turning to a brief discussion of these significant changes, it should be noted that the legitimate waiver of derivative rights still poses the danger of involuntary waiver.

The practice of waiver should be carefully circumscribed by procedural safeguards that will minimize the risk of coercion. George Dix proposes four requirements that are both sensible and not overly onerous for the state: 1) "a requirement that a defendant have articulated in some reasonably unambiguous manner his choice to forgo a right"; 2) "a requirement that a defendant have articulated an awareness of sufficient information about the nature and effects of his choice"; 3) "imposition on some person with official status of an affirmative duty to elicit a subject's awareness of relevant information"; 4) "the embodiment of the official inquiry or the subject's articulation in a contemporaneous formal record".[237] The rights that can be waived may be derivative in nature, but the defendant must at least be informed of the alternative methods by which she can secure the core rights.

An examination of the rights now considered non-waivable might lead one to argue that the scheme is wholly unrealistic and impractical. The abolition of consent search would take away one of the prime investigative tools of the police. Law enforcement officials would argue that consent search is a necessary tool in situations of emergency: for example, if a bomb threat is received the police will need to secure the consent of many property-owners in order to locate the bomb. The emergency situation is not affected by the abolition of waiver because the police are still empowered to search in order to avert catastrophe; however, the police are not entitled to use evidence seized, during an emergency search, in a criminal proceeding. Restrictions on waiver affect the position of criminal defendants at trial, but not necessarily police powers which do not result in criminal prosecutions.

In fact, the abolition of consent search is not as dramatic as it first appears. Properly conceived, the ban on waiver of this core right operates to deny legal significance to an individual's consent to an *unreasonable* search. There is nothing that disallows an individual from consenting to a reasonable search. The core right to privacy is not an absolute right; rather it is a right that can be overridden by a superior state interest. A superior state interest exists when the state has a credible belief in the probability of crime; therefore the core right should more accurately be formulated as a right to privacy except when the state has probable cause to invade. The requirement of obtaining a warrant is merely a further procedural safeguard to ensure that the state is truly in possession of probable cause. Accordingly, a search without probable

[237] Dix, *supra*, note 144 at 206-207.

cause is unreasonable *per se*, whereas a search without a warrant is only presumptively unreasonable. This presumption can be defeated by the presence of specified exceptions to the warrant requirement; a legitimate exception would be the obtaining of an individual's consent.

In other words, an individual cannot consent to a search that is unreasonable because probable cause is lacking, but an individual can consent to a search that is lacking only in the warrant requirement. This analysis introduces the notion of detrimental reliance into the proposal. If the state has probable cause and then searches on consent in lieu of obtaining a warrant, it would be unfair to allow the individual at trial to claim that she has changed her mind and that she wants to contest the previously given consent. The state has detrimentally relied upon the consent because, if not for the consent, the state could have obtained a warrant and thus have converted a presumptively unreasonable search into a reasonable one. However, if the state secures a consent for a search that lacks probable cause then the same detrimental reliance cannot be claimed. At the time of conducting the search there was nothing that the state could have done to convert the search into a reasonable one: therefore, the state cannot argue that by relying upon the consent they were precluded from curing the constitutional deficiency at the time of the search.[238]

The proposal to abolish guilty pleas (in the sense of the plea being dispositive of the case) and plea bargaining is even more contentious than the abolition of consent searches. There are many who believe that the entire administration of justice would collapse if defendants could no longer plead guilty. This doomsday assumption is a product of a myopic vision that evaluates all proposals within the narrow framework of Anglo-American adversarial justice. The administration of criminal justice in Europe does not recognize the guilty plea as a juridically significant event. The guilty plea is treated just as a confession, i.e. another tough and undoubtably very cogent piece of evidence. The absence of the option of pleading guilty and the rigidity of the principle of compulsory prosecution forecloses the emergence of plea bargaining as an alternative method of processing accused people.[239]

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[238] This is basically the position advanced by Westen, *supra*, note 92. He claims (at 1260) "in the absence of prejudice to the state...[a defendant who has previously waived rights] is equally entitled to assert his rights afterwards as before". Hence, the conventional view of waiver—that constitutional rights instantly vanish at the precise moment a defendant declares his wish to relinquish them—is misconceived. The controlling factor in the area of waiver is not the defendant's state of mind but the effect his decision has on the interests of the state. Thus, the state cannot hold a defendant to waiver unless it can represent in good faith that it relied to its detriment on his decision or that it would suffer substantial prejudice if he were allowed to rescind.

[239] See discussion in J. Langbein, "Land Without Plea Bargaining: How the Germans Do It" (1979) 78 Mich. L.Rev. 206. Also, see discussion in articles cited in notes 55, 56, 115, 116 and 246.

The core right of fair trial is partly defined by a burden of proof that requires guilt to be proved beyond a reasonable doubt. Accordingly, one cannot waive this right by conceding guilt, as this concession only raises a high probability of guilt that must be confirmed by other inquiries. The Continental systems view a confession/guilty plea as just another piece of evidence, and even in the presence of a concession of guilt they must conduct a trial. Of course, the uncontested trial is a rather rapid event that can proceed without certain time-consuming formalities, but it is a trial nonetheless. The core right to a fair trial places an obligation upon state officials, either judge or prosecutor, to ensure that a conviction is never registered in the absence of proof beyond a reasonable doubt.

There are many who will contest the relevance of the European experience because of the belief that North-American crime rates are four or five times greater than the crime rates in Europe.[240] According to this view, Europeans can afford the luxury of conducting trials in all cases because they are not burdened by courtrooms that are bursting at the seams. John Langbein has responded to this argument by claiming that plea bargaining is not a product of burgeoning crime rates. He points to plea bargaining in Britain, where the practice is common despite the fact that Britain's crime rates resemble those of continental Europe.[241] He claims that plea bargaining is a product of the logic of adversary criminal procedure. Practical impossibility might foreclose the reform of plea bargaining, but an abstraction, like adversarial ideology, should not stand in the way of reform.

Langbein's views are partially confirmed by recent studies that show that the "case pressure" explanation for plea bargaining is vastly overstated.[242] Jurisdictions that have restricted plea bargaining did not necessarily experience crippling court overload; nevertheless, plea bargaining persisted largely due to the organizational pressures upon counsel to conform and cooperate.[243] A recent study of the processing of cases in Philadelphia revealed the startling fact that bench trials (similar to the streamlined uncontested trial in Europe) did not take much more court time than the proper processing of a guilty plea.[244] The conclusion reached by the author of this study is worth quoting in its entirety:

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[240] G. Arzt, "Responses to the Growth of Crime in the United States and Germany: A Comparison of Changes in Criminal Law and Societal Attitudes" (1979) 12 Cornell Int'l L.J. 43. At p. 44 he states that there are 300% more rapes and burglaries in the U.S. than in Germany, and 700% more robberies.

[241] *Supra*, note 239 at 209-210.

[242] See Heumann, "A Note on Plea Bargaining and Case Pressure" (1975) 9 Law & Soc. Rev. 515; M. Feeley, *The Process is the Punishment* (New York: Russell Sage Foundation, 1979) at 247-261; S. Schulhofer, "Is Plea Bargaining Inevitable" (1984) 97 Harv. L.Rev. 1037.

[243] For a recent study that partially attributed the persistence of plea bargaining to internal group dynamics, see R. Weninger, "The Abolition of Plea Bargaining: A Case Study of El Paso, Texas" (1987) 35 U.C.L.A. L. Rev. 265.

[244] Schulhofer, *supra*, note 242 at 1084-1085.

> Plea bargaining is not inevitable. In most American cities, judges and attorneys have chosen to process cases that way. The Supreme Court has chosen to tolerate, to legitimate, and finally to encourage the plea bargaining system. We can instead choose, if we wish, to afford criminal defendants a day in court. We can cease imposing a price, in months or years of incarceration, upon defendants who exercise that privilege, and can instead permit or even encourage defendants to ask for a hearing in which they may put the prosecution to its proof. We can make available a formal bench trial that permits the expeditious but fair and accurate resolution of criminal cases on the basis of public testimony, tested and challenged with the traditional tools of American adversary procedure. If we nevertheless continue to tolerate plea bargaining, that choice will not tell us that resources are too scarce or that other lawyers, those over there in court, are impatient with zealous advocacy and uncontrollably drawn to more comfortable modes of work. A choice to prefer plea bargaining to an inexpensive, feasible adversary trial will instead tell us a great deal about ourselves.[245]

Before implementing a ban upon pleading guilty and negotiating pleas of guilt, it will be necessary to collect empirical data which might indicate how this proposal would affect the allocation of resources in the justice system. In addition studies must be conducted to determine how it is that European courts have not collapsed under the pressure of increasing court dockets. Some of the factors that have been identified in the maintenance of a manageable court load in Europe are the following: (i) less criminalization of conduct in Europe; (ii) the shifting of minor offences from criminal courts to administrative penal proceedings; (iii) the simplicity of European evidentiary rules; (iv) the use of a mixed tribunal of lay and professional judges who deliberate together instead of an independent jury of laypersons; (v) the willingness of defendants to confess; and (vi) the complete and open prosecutorial discretion that facilitates the decision whether or not to contest the accusation.[246] Reliance upon waiver cannot be displaced without some modification of other components of the criminal justice system. It may be a difficult task, but those who assert its impossibility are merely asserting their reluctance to try.

VII. CONCLUSION

North American criminal justice is permeated by a "trafficking ethos"[247] that allows for the trading, selling, bartering and waiving of fundamental

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[245] *Ibid.* at 1107.

[246] Stepan, *supra*, note 116 at 197-199; Schlesinger, "Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience" (1976) 26 Buffalo L.Rev. 361 at 381.

[247] Dewey, *German Philosophy and Politics* (New York: H. Holt, 1915) at 57-8.

constitutional rights. This model of justice is an extension of a contractarian view which sees the world as a collection of self-interested individuals who lay the foundation for an efficient marketplace by commodifying and bargaining over all aspects of their lives; however, "it is a mistake to use the rights and obligations dependent upon conventionalized prior transactions as a model for all rights and obligations".[248] Constitutional legal rights are unique. They aspire to an immutable institutional arrangement in which the power and authority of the state is carefully limited. Their dissimilarity from ordinary rights that order private relationships cannot be ignored and "in being independent of prior transactions between parties concerned, these rights and obligations are not, in many cases, directly negotiable by the parties".[249]

Waiver of constitutional rights is a practice that must be viewed with suspicion. Only those derivative rights for which "functional alternatives" exist should be subject to waiver, and all other core rights must be seen as mandatory rights which must be claimed by the rights-bearer for the benefit of all. Only by recognizing the collective nature of these rights can we hope to accomplish the great objectives of a Constitution. The persistent haggling and bargaining over the exercise of rights reduces the status of constitutional rights to mere bargaining chips that can be manipulated by agents of the state and agents of the accused.

A scheme of inalienable rights will invariably increase the costs of the administration of justice; however, there usually is some expense involved in staying true to principle. In discussing the burdens imposed upon the state in providing adequate judicial resources to facilitate trial within a reasonable time Mr. Justice Lamer noted that "we cannot shrink from our task of interpreting the *Charter* in a full and fair manner, even when, and perhaps especially when, we are confronted with the possibility of resulting significant institutional adjustment".[250] In a similar vein, Mr. Justice Goldberg of the U.S. Supreme Court echoed the same sentiment in stating that "if the exercise of constitutional rights will thwart the effectiveness of law enforcement then there is something very wrong with that system".[251]

Waiver exposes the false promise of the *Constitution.* Those who waive rights may appear to possess the strength and power of free choice, but, in actuality, they are succumbing to the pressures of a system that cannot afford to live up to its ideals. The poet, Stevie Smith, may have been more preoccupied with her own fears of death than with the plight of criminal defendants, but she perfectly characterized the actions of those persons commanded to appear in our courts when she coined the phrase "not waving, but drowning".

[248] Brown, "Inalienable Rights" (1955) 64 Philos. Rev. 192 at 205.
[249] *Ibid.* at 206.
[250] *Mills*, *supra*, note 4 at 555.
[251] *Escobedo* v. *Illinois*, 378 U.S. 478 at 490 (1964).